

## Survey - Developments in Maryland Law, 1989-90

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## SURVEY

### Developments in Maryland Law, 1989-90

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# Survey

## I. ADMINISTRATIVE LAW

### A. *Statutes of Limitations and Factfinding in Administrative Government*

In *Lofland v. Montgomery County*<sup>1</sup> the Court of Appeals held that an independent fire company's employee was entitled to an evidentiary hearing to determine the timeliness of the filing of his grievance.<sup>2</sup> Finding that the county administrative agency erred in denying Lofland a hearing, the court remanded the case for additional evidence and factfinding by the agency.<sup>3</sup> The court held that under the circumstances, an evidentiary hearing was required as a matter of law to resolve the issue of when the twenty-day limitations period began to run.<sup>4</sup>

Although the court decided the case on this narrow ground, it raised several other administrative law issues that it was not in a position to explain or resolve adequately. First, the court suggested that an employee might be able to file a grievance in a timely manner, based solely on a new policy adopted by the Montgomery County Merit System Protection Board (Board).<sup>5</sup> This suggestion's broader implication is that a new policy adopted in an administrative adjudication may give rise to a timely claim based on facts in existence before the policy's announcement. This would reactivate the limitations period for all employees on a particular issue, giving retroactive effect to all Board policy decisions.<sup>6</sup> Second, although the Court of Appeals in this case did not explicitly adopt the discovery rule in resolving the issue of knowledge of a claim's existence, it utilized language identical to that of the rule,<sup>7</sup> and did not condemn the circuit court's application of it.<sup>8</sup> Third, the court cited the Maryland Administrative Procedure Act,<sup>9</sup> but beyond using the Act to

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1. 319 Md. 265, 572 A.2d 163 (1990).

2. *See id.* at 273, 572 A.2d at 166.

3. *See id.*

4. *See id.*; *infra* notes 61-65, 68-71 and accompanying text.

5. *See* 319 Md. at 272, 572 A.2d at 166.

6. *See infra* text accompanying notes 65-67.

7. *See* 319 Md. at 273, 572 A.2d at 166.

8. *See* Joint Record Extract at E.63, *Lofland v. Montgomery County*, No. 89-105 (opinion of Cir. Ct. Sept. 20, 1988) [hereinafter Joint Record Extract].

9. MD. STATE GOV'T CODE ANN. § 10-215 (1984); *see infra* notes 78-80 and accompanying text.



establish jurisdiction over the case,<sup>10</sup> the court did not make clear whether its holding was based on the Act's provisions. Finally, the absence of citation in the opinion might also suggest that the court relied heavily for its reasoning on the parties' briefs. Therefore, Lofland's claim that his due process rights were violated may have persuaded the court.<sup>11</sup>

In light of these uncertainties, the most conservative interpretation of the court's holding is that it merely requires the agency to produce a more detailed factual record so that a reviewing court can determine the legality of the agency's actions. The case's ambiguity warrants an exploration of the other possibilities, however, to determine its precedential value for Maryland administrative law and reveal the potential burdens that the ambiguities might impose on administrative agencies.

1. *The Case.*—The Wheaton Volunteer Rescue Squad (WRS) operates in Montgomery County, Maryland. On December 30, 1985, it hired Larry Lofland as a firefighter.<sup>12</sup> When Lofland was hired he was a state-certified paramedic,<sup>13</sup> and spent most of his time performing paramedic duties rather than firefighting.<sup>14</sup> As an independent fire company, WRS operated under the Montgomery County Merit System Protection Board's jurisdiction.<sup>15</sup> The Board's personnel regulations stipulate that a merit system employee performing paramedic duties is entitled to a ten percent pay differential over the basic pay.<sup>16</sup> The paramedic employee must satisfactorily complete a one-year probationary period in order to receive this extra pay.<sup>17</sup>

By January 1987, Lofland had completed his probationary period, and received a recommendation that the WRS grant him "per-

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10. See 319 Md. at 273, 572 A.2d at 166.

11. See Brief of Petitioner at 21-22, 24, *Lofland* (No. 89-105).

12. Joint Record Extract, *supra* note 8, at E.37 (Decision on Appeal of L. Lofland, Jan. 26, 1988).

13. See *Lofland*, 319 Md. at 267, 572 A.2d at 163; see Joint Record Extract, *supra* note 8, at E.11 (Weber's Recommendation, Jan. 19, 1987).

14. See 319 Md. at 267, 572 A.2d at 164.

15. See MONTGOMERY COUNTY FIRE AND RESCUE COMMISSION, PERSONNEL REGULATIONS FOR FIRE AND RESCUE SERVICE MERIT SYSTEM EMPLOYEES OF THE INDEPENDENT FIRE AND RESCUE CORPORATIONS OF MONTGOMERY COUNTY § 1 (Apr. 1, 1981) [hereinafter MONTGOMERY FIRE PERSONNEL REGULATIONS].

16. See *id.* at app. § 3(c)(1).

17. 319 Md. at 267, 572 A.2d at 164. An individual must also be assigned to paramedic duty for more than 50% of the time before becoming eligible for the special pay differential. *Id.*

manent" or merit system status as a firefighter/paramedic.<sup>18</sup> But WRS's Board of Directors never acted upon this recommendation.<sup>19</sup> Throughout Lofland's employment with WRS, the Board maintained its one-year probationary policy as it applied to the paramedic pay differential, but Lofland never received additional compensation for performing his paramedic duties, before or after he completed his probationary period.<sup>20</sup>

On August 25, 1987, three months after Lofland transferred to another fire department, the Board reviewed another firefighter's appeal.<sup>21</sup> Harold Isbell also was hired as a firefighter, but as a state-certified paramedic, he spent seventy-four percent of his time performing paramedic duties.<sup>22</sup> The Board resolved Isbell's case by voiding its one-year probationary requirement and awarding Isbell the ten percent pay differential retroactive to the date he was hired.<sup>23</sup>

The Board issued the Isbell decision in late August, 1987. Forty-two days later, Lofland filed a grievance claiming that he was entitled to the pay differential retroactive to the date he was hired, which would encompass his probationary period and the five months following it, before he transferred to the other fire department.<sup>24</sup> Lofland claimed he spent more than fifty percent of his time performing paramedic duties during and after his probationary period, and he had never received the ten percent pay differential.<sup>25</sup> He also explained that he only recently learned about the Board's decision in the Isbell case and believed it applied to his own situation, and this entitled him to the pay differential from his hiring date through the date of his transfer.<sup>26</sup>

The personnel director determined that Lofland did not file his grievance in a timely manner.<sup>27</sup> Under the controlling administrative procedures, an employee must submit a written grievance "within 20 calendar days from the date of occurrence of the griev-

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18. See Joint Record Extract, *supra* note 8, at E.11 (Weber's Recommendation, Jan. 19, 1987).

19. *Id.* at E.54 (Opinion of Cir. Ct., Sept. 20, 1988).

20. *Lofland*, 319 Md. at 267, 572 A.2d at 164.

21. *Id.* at 267-68, 572 A.2d at 164.

22. *Id.* at 267, 572 A.2d at 164.

23. *Id.* The Board based its decision on the fact that it is the state's function to accredit individuals and "a pay differential must be based on competence and proficiency, as measured by State certification, and not solely on longevity." *Id.*

24. See 319 Md. at 268, 572 A.2d at 164.

25. See *id.*

26. See Joint Record Extract, *supra* note 8, at E.9 (Employee Grievance Statement).

27. *Lofland*, 319 Md. at 268, 572 A.2d at 164.

ance or knowledge of the same.'"<sup>28</sup> Accordingly, the director determined that Lofland should have filed his grievance, at the very latest, within twenty days after the day he received his final WRS paycheck without the differential.<sup>29</sup> Lofland appealed to the Board, requesting a hearing.<sup>30</sup>

The Board sustained the personnel director's decision and denied Lofland a hearing,<sup>31</sup> concluding that the grievance was not timely filed because "Lofland had, or should have had knowledge of the grievable issue in early 1987."<sup>32</sup> On appeal, the circuit court reversed the Board's decision, holding that a reasonable person could not be expected to know of a potential grievance when an adopted policy specifically prohibited the compensation sought. The court remanded the case to the Board, and instructed it to conduct a factual hearing on the limitations issue.<sup>33</sup> The Court of Special Appeals reviewed the circuit court's decision and reversed it in an unpublished opinion, holding that the Board's Isbell decision was not promulgated as a broad policy, nor did it intend to apply the policy retroactively.<sup>34</sup> The court also noted that the agency has discretion over whether to conduct a hearing.<sup>35</sup> Lofland petitioned for certiorari to the Court of Appeals.<sup>36</sup>

The Court of Appeals granted certiorari to determine whether the agency erred in refusing to grant Lofland a factual hearing on the timeliness of his grievance.<sup>37</sup> The court stated that only after the appropriate administrative body made sufficient factual findings could it determine the legal issue of "when Lofland reasonably should have known he had a right to file a grievance on a claim for additional compensation entitlement."<sup>38</sup> The court held that as a matter of law, Lofland was entitled to an evidentiary hearing, and if this resulted in a finding that his grievance was timely filed, the

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Joint Record Extract, *supra* note 8, at E.38 (Decision of Appeal of L. Lofland, Jan. 26, 1988). The Board believed that Lofland would have been a merit system employee by this time, and he was therefore entitled to the differential described in the regulations. *Id.*

33. See 319 Md. at 268-69, 572 A.2d at 164.

34. See *Montgomery County v. Lofland*, No. 88-1511, slip op. at 3 (Md. App. Sept. 4, 1988).

35. See *id.* at 3-4.

36. See *Lofland*, 319 Md. at 269, 572 A.2d at 164.

37. See *id.* at 271, 572 A.2d at 166.

38. *Id.* at 272, 572 A.2d at 166.

Board must then consider on the merits his claim for the pay differential.<sup>39</sup>

## 2. *Legal Background.*—

*a. Retrospective Application of Agency Policies.*— The legislature gives administrative agencies the power to promulgate rules and policies for carrying out their administrative functions.<sup>40</sup> If adopted pursuant to statutory authority, these rules and policies have the force and effect of law, and courts interpret agency regulations in the same manner as they interpret statutes.<sup>41</sup> Agencies must apply their policies in a manner consistent with the regulations they have established; an administrative agency's rules and regulations cannot be waived, suspended, or disregarded as long as they remain in force.<sup>42</sup>

According to Maryland case law, a statute affecting substantive matters or rights will not be given retrospective operation "unless its words are so clear, strong and imperative in their retrospective expression that no other meaning can be attached to them."<sup>43</sup> The court presumes that new policies or laws apply prospectively unless the legislature's retrospective intent is clear, and its application will

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39. See *id.* at 273, 572 A.2d at 166.

40. See, e.g., MD. STATE FIN. & PROC. CODE ANN. § 12-101(b)(2)(ii) (1988), which provides that the Board of Public Works may adopt regulations to carry out provisions in the state procurement statute. See also MD. STATE GOV'T CODE ANN. § 10-101(e) (1990 Supp.).

41. Cf. *Maryland Port Admin. v. John W. Brawner Contracting Co.*, 303 Md. 44, 60, 492 A.2d 281, 289 (1985) (the rules for interpreting statutes are the same as those for interpreting rules); see, e.g., *Maryland Comm'n on Human Relations v. Bethlehem Steel*, 295 Md. 586, 592-93, 457 A.2d 1146, 1149 (1983) (although the standards for interpreting a rule are the same as those for interpreting a statute, the agency's expertise is more relevant to the rule's interpretation than to statutory interpretation because an agency is best able to discern its own intent in promulgating a regulation); *Pappas v. Pappas*, 287 Md. 455, 465, 413 A.2d 549, 553 (1980) (in a divorce case the court noted that the same standards are used for interpreting rules as are used for interpreting statutes); *Messitte v. Colonial Mortgage Serv.*, 287 Md. 289, 293, 411 A.2d 1051, 1053 (1980) (in a class action against a lender, rules are interpreted in the same manner as statutes); *Bartell v. Bartell*, 278 Md. 12, 17, 357 A.2d 343, 346 (1976) (in a divorce case, the method of interpreting a statute applies equally to interpreting a rule).

42. See *Hopkins v. Maryland Inmate Grievance Comm'n*, 40 Md. App. 329, 335, 391 A.2d 1213, 1216 (1978) (although due process was not violated, convictions on alleged institutional infractions could not stand if the agency departed from its own procedural rules).

43. *Janda v. General Motors*, 237 Md. 161, 168-69, 205 A.2d 228, 232 (1964) (amendment to unemployment insurance law operated retrospectively to allow for recovery of benefits (quoting *State Tax Comm'n v. Potomac Elec. Power Co.*, 182 Md. 111, 117, 32 A.2d 382, 384 (1943))).

not violate the constitution.<sup>44</sup>

*b. The Discovery Rule.*—Historically in Maryland, the statute of limitations for tort actions began to run from the date the wrong occurred.<sup>45</sup> Over time, the “discovery rule” replaced this earlier rule, and allowed plaintiffs the full statutory period to file an action, taking into consideration latent injuries that were not apparent until several years after the event.<sup>46</sup> The court established that in tort actions the statute of limitations begins to run when the plaintiff “in fact knew or reasonably should have known of the wrong.”<sup>47</sup> Furthermore, actual knowledge or at least inquiry notice is required.<sup>48</sup> The Court of Appeals has used the discovery rule in products liability cases,<sup>49</sup> but it has not yet applied the rule to administrative law cases.

*c. The Administrative Procedure Act.*—The Maryland Administrative Procedure Act<sup>50</sup> permits courts to review administrative agency decisions in particular circumstances. The statute provides that a court may:

reverse or modify the decision if any substantive right of the petitioner may have been prejudiced because a finding,

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44. See *Maryland Comm’n on Human Relations v. Amecom Div. of Litton Sys., Inc.*, 278 Md. 120, 123-24, 360 A.2d 1, 4 (1976) (a law affecting substantive matters may operate retrospectively as long as it does not offend constitutional limitations (citing *Janda*, 237 Md. at 169, 205 A.2d at 233)).

45. See *Pennwalt Corp. v. Nasios*, 314 Md. 433, 438, 550 A.2d 1155, 1158 (1988) (citing *Hahn v. Claybrook*, 130 Md. 179, 182, 100 A. 83, 85 (1917) (in an action alleging silver poisoning, the court adopted the English rule that the statute begins to run from the time the right of action accrues)).

46. See *Pennwalt*, 314 Md. at 439, 550 A.2d at 1159. The court clearly articulated this exception in *Waldman v. Rohrbaugh*, 241 Md. 137, 142, 215 A.2d 825, 829 (1966) (in the medical malpractice context, the plaintiff’s inexpertise prevents the statute of limitations from running on the date of the wrong).

47. *Poffenberger v. Risser*, 290 Md. 631, 636, 431 A.2d 677, 680 (1981) (under the discovery rule, the statute of limitations does not run until the claimant knew or should have known, of the negligence or defect; the discovery rule is now generally applicable).

48. See *id.* at 637, 431 A.2d at 681. The *Poffenberger* court noted that if constructive notice were deemed sufficient to activate the running of limitations, it would recreate the very inequity the discovery rule was designed to eradicate. *Id.*

49. See *Pennwalt*, 314 Md. at 452, 550 A.2d at 1165. The court held that a partially paralyzed mother’s cause of action in a medical products liability case accrued when she knew or should have known of the manufacturer’s wrongdoing or product defect. The court considered three factors in its decision to apply the discovery rule: “1) the interest of diligent plaintiffs to bring suit; 2) the interest of defendants to enjoy repose after an unreasonable delay by plaintiffs; and 3) the interest of society in promoting judicial economy.” *Id.* at 455-56, 550 A.2d at 1165.

50. MD. STATE GOV’T CODE ANN. § 10-101 to -405 (1984).

conclusion, or decision of the agency: (i) is unconstitutional; (ii) exceeds the statutory authority or jurisdiction of the agency; (iii) results from an unlawful procedure; (iv) is affected by any other error of law; (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or (vi) is arbitrary or capricious.<sup>51</sup>

A court first reviews an administrative agency's decision for its legality, and then for substantial evidence in the record to support the decision.<sup>52</sup> The court grants great deference to agency decisions, as they carry a legal presumption of validity.<sup>53</sup> In applying the substantial evidence test, the court may not "substitute its judgment for that of the agency."<sup>54</sup>

*d. Due Process.*—Courts utilize a two-pronged analysis when considering whether an administrative law proceeding violates due process.<sup>55</sup> The first question is whether the individual has a property interest or right protected by the fourteenth amendment.<sup>56</sup> Property includes any benefits for which a person has a legitimate claim of entitlement.<sup>57</sup> Once the court recognizes a property interest, it must determine the type of hearing required, by weighing the individual's interests against those of the agency.<sup>58</sup>

Applying this test, Maryland courts have determined that employees have a protected interest in agency adherence to merit sys-

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51. *Id.* at § 10-215(g)(3).

52. *See* Baltimore Lutheran High School Ass'n v. Employment Sec. Admin., 302 Md. 649, 662, 490 A.2d 701, 708 (1985) (refusing to make independent findings of fact or substitute its judgment for the agency's).

53. *See id.* at 662-63, 490 A.2d at 708.

54. *Id.* at 662, 490 A.2d at 708; *see* Bulluck v. Pelham Wood Apartments, 283 Md. 505, 512-13, 390 A.2d 1119, 1123-24 (1978) (discussing the meaning and application of "substantial evidence").

55. *See* Andre v. Montgomery County Personnel Bd., 37 Md. App. 48, 63, 375 A.2d 1149, 1157 (1977) (adopting and applying the standard set out by the Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972), in determining that procedural due process applies to liberty and property interests protected by the fourteenth amendment).

56. *See id.*

57. *See id.* at 63-64, 375 A.2d at 1157. According to the Supreme Court, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it." *Roth*, 408 U.S. at 577.

58. *See* Riger v. L. & B. Ltd., 278 Md. 281, 289, 363 A.2d 481, 486 (1976) (adopting and applying the standard set out by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), for determining procedural due process requirements when state action deprives a person of a property interest).

tem procedures.<sup>59</sup> After it balances the interests involved, however, the court may find that a full judicial hearing is not required, and that existing administrative procedures satisfy the constitutional right to be heard.<sup>60</sup>

3. *Analysis.*—

a. *Retrospective Application of Agency Policy and Regulations.*—The Court of Appeals remanded the case because it had insufficient facts to determine when the twenty-day limitations period began to run. The court suggested that there were at least two different points from which the twenty days could run: the date of the occurrence, and the date Lofland had knowledge of it.<sup>61</sup> But the court did not adequately explain how to resolve the distinct issues presented by Lofland's grievance: the probationary period pay differential and the post-probationary pay differential.

The Board identified "early 1987" as the time Lofland had the requisite knowledge to file a grievance.<sup>62</sup> Early 1987 refers to Lofland's completion of the probationary period; thus the Board only resolved the post-probationary period issue and ignored the possible implications of the Isbell decision. The circuit court, on the other hand, addressed only the broader policy issue of applying the Isbell decision to Lofland's probationary period pay differential.<sup>63</sup> The Court of Special Appeals disagreed with the circuit court as to both the issue and the result. It considered only the post-probationary period, and denied any application of the Isbell decision to Lofland's case.<sup>64</sup>

The Court of Appeals did not discuss these inconsistencies among the lower courts, or explain its own holding with reference

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59. See *Andre*, 37 Md. App. at 64, 375 A.2d at 1158. In *Andre*, two unsuccessful applicants for vacancies in the county department of recreation sought judicial review of the personnel board's decision refusing to appoint them, despite the board's finding that the merit system procedures were violated in filling the vacancies. Although it refused to enjoin such promotions, the court nevertheless determined that the applicants have a "property right to the County's abiding by the merit system regulations," and "to the extent that the Montgomery County Code sets forth procedures for promotion, the appellants are entitled to its fair and accurate application." *Id.* at 63-64, 375 A.2d at 1157-58.

60. See *id.*

61. See *Lofland*, 319 Md. at 273, 572 A.2d at 166.

62. Joint Record Extract, *supra* note 8, at E.38 (Decision of Appeal of L. Lofland, Jan. 26, 1988).

63. See *id.* at E.64-65 (Opinion of Cir. Ct., Sept. 20, 1988).

64. See *Montgomery County v. Lofland*, No. 88-1511, slip op. at 2-4 (Md. App. Sept. 4, 1988).

to these distinct issues. The court simply required that the agency conduct a factual hearing to resolve the "knowledge" issue.<sup>65</sup> Applying this holding to the probationary period pay differential arguably means that the agency must determine when Lofland should reasonably have known of his right to file a grievance, or rather, when he became aware of the Isbell decision. Such a holding also implies that the Isbell decision has retrospective effect, and could start the running of a new twenty-day limitations period. Without the requisite "clear intent"<sup>66</sup> to apply a decision or policy retrospectively, courts seldom impose on agencies such an onerous burden. However, agencies should clearly specify when limitations periods are activated and prohibit retrospective application of policies or individual decisions.

As to the post-probationary period differential, the *Lofland* opinion suggests that the agency must determine as a factual matter, whether it was reasonable to charge Lofland with knowledge of his grievance simply because his paycheck did not reflect the differential or because the personnel regulations granted him the right to the differential.<sup>67</sup> This holding implies that employees must have actual knowledge of policies and regulations before an agency can deny the employee's privileges under them. The entire issue of knowledge is discussed next.

*b. The Discovery Rule.*—In *Lofland*, the applicable procedural limitation required an employee to file a grievance, "within 20 calendar days from the date of occurrence of the grievance or knowledge of the same."<sup>68</sup> The personnel director and the Board interpreted this to mean that the employee must file the grievance within twenty days after it occurred, or within twenty days after the grievant discovered the grievable actions. Their interpretation focused upon the grievant's knowledge of the act or omission, and did not consider the grievant's knowledge of the facts or law that give him a right to make a claim.<sup>69</sup> Lofland argued that the phrase refers to the grievant's knowledge of the circumstances that would give

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65. See *Lofland*, 319 Md. at 273, 572 A.2d at 166.

66. Maryland Comm'n on Human Relations v. Amecom Div. of Litton Sys., Inc., 278 Md. 120, 123-24, 360 A.2d 1, 4 (1976); see *Hopkins v. Maryland Inmate Grievance Comm'n*, 40 Md. App. 329, 391 A.2d 1213 (1978).

67. See 319 Md. at 273, 572 A.2d at 166.

68. MONTGOMERY FIRE PERSONNEL REGULATIONS, *supra* note 15.

69. See Joint Record Extract, *supra* note 8, at E.35 (*Lofland's* Appeal to Board, Jan. 4, 1988).



him a basis for making the claim.<sup>70</sup>

The Court of Appeals accepted the administrative regulation's explicit consideration of the employee's "knowledge," and interpreted this to mean the time when Lofland "should reasonably have had knowledge of his grievance."<sup>71</sup> This language is almost identical to the language used in tort cases applying the discovery rule.<sup>72</sup> In these tort cases, however, the rule permits plaintiffs to file a complaint even though the injury itself is not detected or reasonably discoverable until after the limitations period expires.<sup>73</sup> The courts have not applied the rule to a situation such as Lofland's, in which the grievant simply was unaware of his right to file an action, or in which the substantive law changes without articulating the consequences for the statute of limitations.

Applying the discovery rule to Lofland's case as the circuit court suggested,<sup>74</sup> would have two consequences. First, administrative agencies would be required in grievance proceedings to use the rule, along with its principles and precedents. This could alleviate much uncertainty in the process and allow for an objective standard of review, but it could also force agencies to conduct detailed factual investigations that would consume their limited resources.

The second consequence of applying the discovery rule in *Lofland* would be that the rule itself would expand. In Lofland's case, it is unclear whether he knew of the personnel regulations and that he had a right to file a grievance for his post-probationary period differential.<sup>75</sup> These issues involve Lofland's knowledge of his rights and, unlike tort cases, do not necessarily concern his knowledge of an injury.<sup>76</sup> The discovery rule's application would undermine the statute of limitations' purpose, and would reward grievants who remain ignorant of the law and agency policies. Although the circuit court judge suggested that using the discovery rule would be justified and logical,<sup>77</sup> the Court of Appeals did not explicitly sanction its applica-

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70. See *id.*

71. *Lofland*, 319 Md. at 273, 572 A.2d at 166.

72. See *Pennwalt Corp. v. Nasios*, 314 Md. 433, 444, 550 A.2d 1155, 1161 (1988); *Poffenberger v. Risser*, 290 Md. 631, 636, 431 A.2d 677, 680 (1981).

73. See *Pennwalt*, 419 Md. at 444-45, 550 A.2d at 1161 (describing *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 256, 464 A.2d 1020 (1983)); *Poffenberger*, 290 Md. at 636, 431 A.2d at 680.

74. See Joint Record Extract, *supra* note 8, at E.63 (Opinion of Cir. Ct., Sept. 20, 1988).

75. See *Lofland*, 319 Md. at 272, 572 A.2d at 166.

76. See generally *Pennwalt*, 314 Md. 433, 550 A.2d 1155; *Poffenberger*, 290 Md. 631, 431 A.2d 677.

77. The circuit court judge noted that, "[e]ngrafting into regulatory filing limitations

tion in administrative cases. Agencies should wait for more specific directives from the court before proceeding under the discovery rule's analysis.

c. *The Administrative Procedure Act.*—The Court of Appeals held that the agency erred when it neglected to make factual findings concerning Lofland's "knowledge" of his grievance.<sup>78</sup> A conservative interpretation would conclude that the court reviewed the agency's determination under the substantial evidence standard of the Maryland Administrative Procedure Act,<sup>79</sup> and simply decided that the record did not adequately support the agency's decision. This was the circuit court's finding.<sup>80</sup> This holding is relatively narrow and fact specific, but gives the agency little guidance with respect to legally necessary procedures.

The Court of Appeals found that the agency did not elicit enough factual material to make a determination about Lofland's "knowledge."<sup>81</sup> The court may have intended that the agency simply make sufficient factual determinations to enable the court to perform its reviewing function. Another interpretation is that in grievance proceedings the personnel director and the Board must always conduct factual hearings. Alternatively, the opinion could mean that cases involving timeliness disputes must be determined by a hearing. A fourth plausible interpretation is that the agency must hold a hearing whenever the regulation or procedure involves an element of knowledge. Whatever the court's intent, any one of these arguably valid interpretations might overburden the quasi-judicial and adjudicatory arm of state agencies. Until the court makes an affirmative ruling on this issue, agencies would be wise to prepare detailed factual findings.

d. *Due Process.*—Due process analysis involves identifying a property interest, then defining the actual procedures the government must follow before it can impinge upon that interest.<sup>82</sup> The court in *Lofland* did not apply or mention due process rights at all.

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the discovery rule generally applicable to most suits filed in the law courts is consistent with the policy of pursuing a rule of reason in limiting either the law suits or regulatory actions." Joint Record Extract, *supra* note 8, at E.63 (Opinion of Cir. Ct., Sept. 20, 1988).

78. See *Lofland*, 319 Md. at 272-73, 572 A.2d at 166.

79. MD. STATE GOV'T CODE ANN. § 10-215(g)(3)(v) (1984).

80. See Joint Record Extract, *supra* note 8, at E.65 (Opinion of Cir. Ct. Sept 20, 1988).

81. See 319 Md. at 272-73, 572 A.2d at 166.

82. See *supra* notes 55-58 and accompanying text.

But because it held that Lofland was entitled to a hearing as a matter of law,<sup>83</sup> perhaps the court considered the constitutionality of the agency's decision. Moreover, Lofland stated in his brief that due process alone entitled him to a hearing,<sup>84</sup> and the court, ruling in his favor, did not reject his argument. But neither did it clearly state whether the hearing requirement was alternatively justified by the Administrative Procedure Act, agency regulations,<sup>85</sup> or any other legal basis. The court might simply have remanded the case for further fact-finding—by whatever means the Board chose—but it instead remanded the case with specific instructions to the Board to conduct an evidentiary hearing.<sup>86</sup>

The court did not explain why Lofland's situation warranted the extreme remedy of full evidentiary hearing, but the suggested due process claim's practical consequences must be considered. If the federal Constitution's due process clause requires state agencies to conduct evidentiary hearings in all factual disputes, agency operations would be seriously hampered because these hearings would consume the agency's scarce resources. The practical difficulty of implementing such procedures suggests that *Lofland* should not be viewed as extending due process rights in grievance proceedings; however, legitimate complainants should not overlook due process claims: the due process interpretation of the case is not completely unfounded.

4. *Conclusion.*—After *Lofland*, administrative agencies should be prepared to support their actions with more thorough factual findings. It is not at all clear whether the court believes that grievants have a due process right to an evidentiary hearing, or whether only specific circumstances warrant substantial factual findings. Similarly unclear is whether agency policies apply retrospectively, even without clear legislative intent, and whether the discovery rule or a similar analysis applies to agency grievance proceedings. Agencies should tread lightly in these areas until the court explicitly defines the law's limitations.

EMILY J. VAIAS

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83. See *Lofland*, 319 Md. at 273, 572 A.2d at 166.

84. Brief of Petitioner at 21-22, 24, *Lofland* (No. 89-105).

85. See MONTGOMERY FIRE PERSONNEL REGULATIONS, *supra* note 15; MONTGOMERY COUNTY FIRE AND RESCUE COMMISSION, ADMINISTRATIVE PROCEDURE No. 7-3, § 5.0 (Oct. 13, 1981, rev. Feb. 9, 1984).

86. See 319 Md. at 273, 572 A.2d at 166.

## II. CIVIL PROCEDURE

### A. *Appealable Judgments and Notices of Appeal*

In *B & K Rentals & Sales Co. v. Universal Leaf Tobacco Co.*,<sup>1</sup> the Court of Appeals held that a party's appeal from the denial of its motions for reconsideration and for new trial did not preclude appellate review of the underlying judgment on the merits.<sup>2</sup> The Court of Appeals reversed the Court of Special Appeals, finding that the plaintiff's appeal of the denial of its motions was taken from the only final appealable judgment in the case,<sup>3</sup> an appeal that brought up for review all earlier orders in the case.<sup>4</sup> The court concluded that "limiting language" in a notice of appeal is to be construed as surplusage.<sup>5</sup>

The *B & K Rentals* decision clarifies for appeals purposes the relationship between post-judgment motions and the finality of an underlying judgment.<sup>6</sup> The court's opinion for all practical purposes makes final judgments "interlocutory" rulings because judgment motions deprive judgments of their finality.<sup>7</sup> Finally, the Court of Appeals' directive to liberally construe notices of appeal is a victory for substance over form in Maryland's appellate procedure.<sup>8</sup>

1. *The Case.*—In June 1984, B & K Rentals (B & K) leased warehouse space owned and operated by Universal Leaf Tobacco Co. (Universal) to store items B & K used in its business.<sup>9</sup> Fire destroyed the warehouse and its contents in April 1985.<sup>10</sup> B & K alleged that Universal was negligent, and sued for damages.<sup>11</sup>

The trial court denied Universal's motion for a directed ver-

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1. 319 Md. 127, 571 A.2d 1213 (1990).

2. See *id.* at 130, 571 A.2d at 1215.

3. See *id.* at 131, 571 A.2d at 1215.

4. See *id.* at 132-33, 571 A.2d at 1216.

5. See *id.* at 138, 571 A.2d at 1218.

6. See *infra* notes 64-67 and accompanying text.

7. See *infra* notes 68-71 and accompanying text.

8. See *infra* notes 72-78 and accompanying text.

9. See *B & K Rentals & Sales Co., Inc. v. Universal Leaf Co.*, 73 Md. App. 530, 531-32, 535 A.2d 492, 493 (1988), *aff'd*, 319 Md. 127, 571 A.2d 1213 (1990). B & K Rentals provides staging and seating for public gatherings. 73 Md. App. at 530-31, 535 A.2d at 492-93.

10. 73 Md. App. at 530-31, 535 A.2d at 492-93.

11. See *id.*

dict.<sup>12</sup> The jury returned a verdict for B & K, and awarded it \$123,252 in damages.<sup>13</sup> Universal filed a motion for judgment notwithstanding the verdict, which the trial court granted on January 19, 1987.<sup>14</sup> Within ten days of that judgment, on January 28, 1987, B & K filed a motion for reconsideration, and a motion for a new trial. On February 17, 1987, the trial court denied both motions.<sup>15</sup>

B & K filed notice of appeal, which stated: "It is respectfully requested that you enter an appeal to the Court of Special Appeals on behalf of B & K Rentals & Sales Co., Inc., Plaintiff, from this Court's Order denying Plaintiff's Motion for Reconsideration and Motion for New Trial, entered in this action on February 17, 1987."<sup>16</sup>

In the Court of Special Appeals, B & K argued that the trial court's ruling on the motion for judgment notwithstanding the verdict was erroneous, and it also claimed that the trial judge made several errors during the trial.<sup>17</sup> The Court of Special Appeals declined to review any of these issues, finding that B & K limited the scope of its appeal by appealing from the February 17 order, and not specifically appealing the January 19 judgment.<sup>18</sup> The Court of Special Appeals determined that B & K's appeal from the denial of its motion to reconsider the judgment did not serve as an appeal from the final judgment.<sup>19</sup> Consequently, the court limited its review to the question of whether the trial court abused its discretion in denying the motions. The Court of Special Appeals concluded

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12. *B & K Rentals*, 319 Md. at 128, 571 A.2d at 1214.

13. *Id.*

14. 73 Md. App. at 533, 535 A.2d at 494.

15. *Id.*

16. *B & K Rentals*, 319 Md. at 129, 571 A.2d at 1214.

17. *See id.*

18. *See* 73 Md. App. at 535, 535 A.2d at 495.

19. *See id.* The Court of Special Appeals stated that "when appellant filed its notice of appeal on 18 March 1987, it could have appealed (1) the judgment notwithstanding the verdict, (2) the denial of the 'motion to reconsider,' or (3) the denial of the motion for new trial, or all of the above." *Id.* The Court of Special Appeals turned to dictum from *Shipp v. Autoville Ltd.*, 23 Md. App. 555, 328 A.2d 349 (1974), *cert. denied*, 274 Md. 725 (1975), which stated that "if there are two or more appealable judgments in a cause, an appellant designating one would be bound by the designation." *Id.* at 560 n.4, 328 A.2d at 352 n.4. Applying the principle from *Shipp* to its view that two or more appealable judgments existed, the Court of Special Appeals found that B & K Rentals was bound by its designation of the order denying the motions as the judgment appealed from. *See* 73 Md. App. at 535, 535 A.2d at 495.

that the trial court did not abuse its discretion, and therefore affirmed.<sup>20</sup>

The Court of Appeals granted B & K's petition for a writ of certiorari to review a single issue:

Is the Court of Special Appeals precluded from considering the propriety of the underlying decision on the merits solely because [the notice of appeal] designates, as the judgment appealed from, the decision of the trial court upon timely post-trial motions, where such judgment is the final decision rendered by the trial court in the case . . . ?<sup>21</sup>

The Court of Appeals answered in the negative, and reversed.<sup>22</sup>

## 2. *Legal Background.*—

### a. *Effect of Post-Judgment Motions on the Finality of Judgments.*—

Generally, a court that grants a party's motion for judgment notwithstanding the verdict enters a final appealable judgment.<sup>23</sup> But subsequent motions for a new trial, to alter or amend a judgment or court decision, or for the court to exercise its revisory power, may deprive a previously "final" judgment of its finality. Maryland rule 2-533 states that a party whose verdict has been set aside on a motion for judgment notwithstanding the verdict may file a motion for new trial within ten days after entry of that judgment.<sup>24</sup> Rule 2-534 provides that in an action decided by the court, a motion to alter or amend a judgment may be filed within ten days of the judgment, and may be joined with a motion for new trial.<sup>25</sup>

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20. See *id.* at 538, 535 A.2d at 496.

21. 319 Md. at 130, 571 A.2d at 1215 (brackets and ellipses in original).

22. See *id.*

23. To be final, a ruling must either determine and conclude the rights involved, or deny the means of further prosecuting one's rights and interests in a proceeding. *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41, 566 A.2d 767, 773 (1989). To be considered final and conclusive, the ruling must be unqualified and complete, except as to something that would be regarded as collateral to the proceeding. *Id.*, 566 A.2d at 774. It must leave nothing more to be done to effectuate the court's disposition of the matter. *Id.*, 566 A.2d at 773-74.

24. See Md. R. 2-533 (1991). It states, in pertinent part:

Any party may file a motion for new trial within ten days after entry of judgment. A party whose verdict has been set aside on a motion for judgment notwithstanding the verdict or a party whose judgment has been amended on a motion to amend the judgment may file a motion for new trial within ten days after entry of the judgment notwithstanding the verdict or the amended judgment.

*Id.*

25. See Md. R. 2-534 (1991):

Maryland rule 8-202(c) provides that when a motion is filed pursuant to rules 2-533 or 2-534, notice of appeal to the Court of Special Appeals must be filed within thirty days after denial or disposition of the motions.<sup>26</sup> Based upon the principle in rule 8-202(c), Maryland appellate courts have determined that "when a motion to alter or amend an otherwise final judgment [or a motion for a new trial] is filed within ten days after the judgment's entry, the judgment loses its finality for the purposes of appeal."<sup>27</sup>

In *Unnamed Attorney v. Attorney Grievance Commission*,<sup>28</sup> the circuit court on January 22, 1985 issued an order that required the unnamed attorney to produce certain ledgers, agreements, and files.<sup>29</sup> Ten days later, the Attorney Grievance Commission (AGC) filed a motion that sought to impose further requirements on the attorney. Before the circuit court ruled on the AGC's motion, the attorney filed an order of appeal from the January 22 order. The AGC filed a motion to dismiss the pending appeal on the ground that the January 22 order was interlocutory.<sup>30</sup> The Court of Appeals ruled that the January 22 order was final and appealable when the circuit court entered it,<sup>31</sup> but the order was rendered nonfinal and nonappealable by AGC's timely filing of its motion to amend.<sup>32</sup>

The Court of Appeals reiterated this principle less than one

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In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. A motion to alter or amend a judgment may be joined with a motion for a new trial.

*Id.*

26. See Md. R. 8-202(c) (1991). Rule 8-202 governs the time of filing notices of appeal to the Court of Special Appeals only. It provides:

In a civil action, when a timely motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the notice of entry shall be filed within 30 days after entry of (1) a notice of withdrawing the motion or (2) an order denying a motion pursuant to Rule 2-533 or disposing of a motion pursuant to Rule 2-532 or 2-534. A notice of appeal filed before the withdrawal or disposition of any of these motions does not deprive the trial court of jurisdiction to dispose of the motion.

*Id.*

27. *Unnamed Attorney v. Attorney Grievance Comm'n*, 303 Md. 473, 486, 494 A.2d 940, 946 (1985); see *Yarema v. Exxon Corp.*, 305 Md. 219, 241 n.19, 503 A.2d 239, 250 n.19 (1986); *Sieck v. Sieck*, 66 Md. App. 37, 42-44, 502 A.2d 528, 531-32 (1986).

28. 303 Md. 473, 494 A.2d 940 (1985).

29. See *id.* at 479, 494 A.2d at 943.

30. See *id.* The Court of Special Appeals denied the motion to dismiss, and certified the case to the Court of Appeals.

31. See *id.* at 484, 494 A.2d at 945.

32. See *id.* at 484-86, 494 A.2d at 945-46.

year later in *Yarema v. Exxon Corp.*<sup>33</sup> In *Yarema*, the parties disputed which of two judgments constituted the final judgment in the case: the original judgment, entered on December 16, 1983, or the revised judgment, entered twenty-eight days later, on January 13, 1984.<sup>34</sup> The court stated that "even if the December 16, 1983 judgment was final and appealable when entered, the revision of such judgment on January 13, 1984 deprived the earlier action of its finality."<sup>35</sup> The court added in a footnote that if the motion to revise the judgment had been filed within ten days of the judgment, the motion itself would have deprived the judgment of its finality for appeals purposes.<sup>36</sup> The rulings in *Unnamed Attorney* and *Yarema* demonstrate a consistent interpretation of the relationship between Maryland Rule 8-202(c) and certain post-judgment motions even prior to *B & K Rentals*.

*b. Appeal From Final Judgments: Appellate Review of Earlier Orders in a Case.*—Maryland Rule 8-131(d) governs review of interlocutory orders on an appeal from a final judgment.<sup>37</sup> On such an appeal, rule 8-131(d) has been applied to allow appellate review of interlocutory orders such as denial of a jury trial,<sup>38</sup> lack of jurisdiction to determine an issue,<sup>39</sup> and suppression of evidence.<sup>40</sup>

*c. Effect of Limiting Language in a Notice of Appeal.*—Rules 8-201<sup>41</sup> and 8-202<sup>42</sup> set forth the procedure for securing Court of Special Appeals review by filing a timely notice of appeal. Neither rule requires that a notice of appeal specify the judgment or order appealed from, or the party appealing,<sup>43</sup> and the most recent case law

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33. 305 Md. 219, 503 A.2d 239 (1986).

34. *See id.* at 240, 503 A.2d at 250.

35. *Id.*

36. *See id.* at 241 n.19, 503 A.2d at 250 n.19.

37. *See* MD. R. 8-131(d). The rule provides that: "On an appeal from a final judgment, an interlocutory order previously entered in the action is open to review by the Court, unless an appeal has previously been taken from that order and decided on the merits by the Court." *Id.*

38. *See* *Vogel v. Grant*, 300 Md. 690, 481 A.2d 186 (1984).

39. *See* *Lewis v. Lewis*, 290 Md. 175, 428 A.2d 454 (1981).

40. *See* *State v. Ensor*, 27 Md. 670, 342 A.2d 1 (1975).

41. MD. R. 8-201 (1991). The rule states that: "Except as provided in Rule 8-204, the only method of securing review by the Court of Special Appeals is by the filing of a notice of appeal within the time prescribed in Rule 8-202." *Id.*

42. MD. R. 8-202(a). "Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." *Id.*

43. *Compare* FED. R. APP. P. 3(c), which provides in pertinent part: "The notices of appeal shall specify the party or parties taking the appeal; shall designate the judgment,



supports liberal construction of this language.<sup>44</sup>

In *Newman v. Reilly*,<sup>45</sup> the Court of Appeals noted that the Maryland Rules of Procedure do not require that a notice of appeal identify the party making the appeal, or the judgment appealed from.<sup>46</sup> There, the court rejected the Court of Special Appeals' limitation on the scope of the appeal when it was based solely on language gratuitously included in the notice of appeal.<sup>47</sup>

In *Institutional Management Corp. v. Cutler Computer Concepts, Inc.*,<sup>48</sup> the Court of Appeals also reversed the Court of Special Appeals' refusal to give liberal construction to language of appeal. Institutional Management filed a timely appeal.<sup>49</sup> The language of the appeal, however, referred to the judgment *nisi*, entered by the trial court on December 3, 1980,<sup>50</sup> rather than to the final judgment. The Court of Appeals found, however, that "an order for appeal timely filed subsequent to the entry of final judgment was an appeal from a final judgment, irrespective of the text of the order for appeal."<sup>51</sup>

Similarly, in *MPTH Associates v. State Department of Assessments and Taxation*,<sup>52</sup> the Court of Appeals reiterated its reluctance to restrict appellate review to the order of appeal's language. MPTH filed an appeal from the trial court's "order" following a judgment on the merits and denial of a timely-filed motion to reconsider. The Department of Assessments asked the Court of Appeals to interpret "order" as limiting the appeal to the order denying MPTH's motion for reconsideration. The court disposed of this issue in a footnote,

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order or part thereof appealed from; and shall name the court to which the appeal is taken." *Id.*

44. See *infra* notes 45-53 and accompanying text. But see also *infra* notes 54-58 and accompanying text.

45. 314 Md. 364, 550 A.2d 959 (1988).

46. See *id.* at 383, 550 A.2d at 968.

47. See *id.*, 550 A.2d at 968-69. The court added that if the plaintiff's attorney simply had signed "a paper reading 'Please note an appeal to the Court of Special Appeals' and the paper was filed within thirty days of the entry of the [judgments] the legal effect would have been to bring up for review all earlier appealable judgments in the case." *Id.*, 550 A.2d at 969.

48. 294 Md. 626, 451 A.2d 1224 (1982).

49. *Id.* at 628, 451 A.2d at 1225. Final judgment was entered on December 9, 1980; the appeal was filed January 8, 1981. *Id.*

50. At that time, Maryland Rule 564(b)(1) provided that in a court trial, the court should direct a judgment *nisi*, which the clerk would enter as a final judgment unless the opposing party filed a motion for a new trial within three days. See *id.* at 629 n. 1, 451 A.2d at 1226 n.1.

51. *Id.* at 631, 451 A.2d at 1226.

52. 302 Md. 319, 487 A.2d 1184 (1985).

saying "[w]e refuse to torture the language of the notice to produce the effect which the County requests."<sup>53</sup>

The clearest precedent opposing liberal construction was a less recent case, *Carter v. State*.<sup>54</sup> In *Carter*, the defendant filed a timely notice of appeal, which stated that the appeal was "on the constitutional question relating to Speedy Trials."<sup>55</sup> Carter did not raise the speedy trial issue in his brief, however, and instead argued other matters.<sup>56</sup> The Court of Appeals found that his notice of appeal was limited to the speedy trial issue.<sup>57</sup> The court concluded that Carter waived his right to appeal the sole reviewable issue because he failed to brief it.<sup>58</sup>

3. *Analysis.*—The Court of Appeals' opinion in *B & K Rentals* made three main points. The court first determined that the case did not present two or more appealable judgments.<sup>59</sup> It held that the order in B & K's notice of appeal "became the only final appealable order in the case."<sup>60</sup> Second, the Court of Appeals stated that B & K's appeal from the February 17 final judgment subjected the January 19 "judgment" to review on appeal.<sup>61</sup> The court noted that it is "long established" that an appeal from a final judgment ordinarily brings up for review all earlier orders in the case.<sup>62</sup> Finally, the Court of Appeals stated that it will treat as surplusage language that limits the scope of a timely notice of appeal, and that the issues on appeal should be framed in the briefs, information report, and pre-hearing conference.<sup>63</sup>

a. *Clarification of Appealable Judgments.*—The *B & K Rentals* decision reiterated that "when a motion to alter or amend an otherwise

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53. *Id.* at 328 n.6, 487 A.2d at 1189 n.6. Still, the court's decision clearly implied that if the notice of appeal contained words limiting it to the denial of the motion for reconsideration, appellate review might have been limited to that order, and the question of the circuit court's possible abuse of discretion. *See id.* In any event, the court's analysis is far removed from *Newman* and the idea that one need only file a timely notice of appeal stating, "Please note an appeal to the Court of Special Appeals" to bring up all appealable judgments in a case. *See supra* note 47 and accompanying text.

54. 286 Md. 649, 408 A.2d 1335 (1979).

55. *Id.* at 651, 408 A.2d at 1336.

56. *See id.*

57. *See id.*

58. *See id.*, 408 A.2d at 1337. The court remanded the case to the Court of Special Appeals with instructions to dismiss the appeal. *See id.* at 652, 408 A.2d at 1337.

59. *See B & K Rentals*, 319 Md. at 130, 571 A.2d at 1215.

60. *Id.* at 131, 571 A.2d at 1215.

61. *See id.* at 132, 571 A.2d at 1216.

62. *See id.* at 132-33, 571 A.2d at 1216.

63. *See id.* at 138, 571 A.2d at 1218.

final judgment [or a motion for new trial] is filed within ten days after the judgment's entry, the judgment loses its finality for the purposes of appeal."<sup>64</sup> Thus in *B & K Rentals* the order denying the post-judgment motions was the only final appealable judgment in the case.<sup>65</sup>

Strong precedent holds that post-judgment motions timely filed under rules 2-533, 2-534, or 2-535 will render the underlying judgment nonfinal and nonappealable.<sup>66</sup> In such a situation, an appeal filed before disposition of the motion is ineffective, and a new notice of appeal will be necessary following disposition.<sup>67</sup> The Court of Appeals' ruling in *B & K Rentals* is significant because it reiterates that immediately upon a motion filed pursuant to rules 2-533, 2-534, or 2-535, the underlying judgment is no longer final nor appealable.

*b. Appellate Review of Earlier Orders in a Case.*—The *B & K Rentals* court premised part of its holding on the "long established principle of appellate procedure now embodied in Rule 8-131(d), that an appeal from a final judgment ordinarily brings up for review *all earlier orders* in the case."<sup>68</sup> Through the language "all earlier orders," the court avoided labeling as interlocutory the underlying judgment notwithstanding the verdict. But because rule 8-131(d) is concerned exclusively with interlocutory orders,<sup>69</sup> that label is inescapably implied.

The judgment notwithstanding the verdict, deprived of its finality by B & K's motions, is not interlocutory in the traditional sense. The court supported its application of rule 8-131(d) by citing a variety of cases in which interlocutory orders were reviewed on an appeal from a final judgment.<sup>70</sup> None of the cases cited, however, presents a situation in which an otherwise final judgment became interlocutory upon the subsequent filing of motions for the court to exercise its revisory power.

Thus, *B & K Rentals* stands in part for the proposition that an underlying judgment deprived of its finality by the filing of motions will become an interlocutory order for appeals purposes. As an in-

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64. See *id.* at 132, 571 A.2d at 1216 (quoting *Unnamed Attorney v. Attorney Grievance Comm'n*, 303 Md. 473, 486, 494 A.2d 940, 946 (1985)).

65. See *id.*

66. See *supra* note 27 and accompanying text.

67. See *Unnamed Attorney*, 303 Md. at 486, 494 A.2d at 946.

68. 319 Md. at 132-33, 571 A.2d at 1216 (emphasis added).

69. See *supra* note 37 and accompanying text.

70. See *supra* notes 38-40 and accompanying text.

terlocutory order, the underlying judgment will be reviewable on an appeal from a final judgment under rule 8-131(d).

Arguably, the Court of Appeals could have concluded its decision in *B & K Rentals* at this point. After it held that the judgment from which B & K appealed was the only final appealable judgment, and that under 8-131(d) the underlying judgment was open to appellate review, the court had fully addressed the question before it.<sup>71</sup> The court continued, however, making a significant statement on the law concerning limiting language in a notice of appeal.

*c. Liberal Construction of Notices of Appeal.*—In the final part of its decision, the Court of Appeals made it clear that Maryland courts must liberally construe notices of appeal. Language that might limit the issues on appeal must be treated as “surplusage” under the overarching principle that the definition of issues is a “function of the briefs, information report, and prehearing conference,” and not the notice of appeal.<sup>72</sup>

Maryland case law, as well as a decision of the United States Supreme Court,<sup>73</sup> supports the court’s conclusion. Maryland decisions such as *Newman* and *Institutional Management* strongly support the court’s liberal construction of notices of appeal.<sup>74</sup> Maryland cases note the absence of any procedural requirement that a notice of appeal set forth the judgment appealed from, or even identify the

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71. See *supra* note 21 and accompanying text.

72. See *B & K Rentals*, 319 Md. at 133-34, 571 A.2d at 1216.

73. See *Foman v. Davis*, 371 U.S. 178 (1962). In *Foman*, the First Circuit reasoned that since Foman’s notice of appeal failed to specify that her appeal was taken from the underlying judgment as well as an order denying post-judgment motions, the court’s appellate review was limited to the question of the district court’s abuse of discretion in refusing to grant the motions. See *Foman v. Davis*, 292 F.2d 85, 87 (1st Cir. 1961), *rev’d*, 371 U.S. 178 (1962).

The Supreme Court reversed, stating that the defect in the second notice did not mislead or prejudice the respondent, and that “the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt” to appeal from the underlying judgment as well. 371 U.S. at 181.

The *Foman* Court then instructed:

It is too late in the day and entirely contrary to the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. “The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”

*Id.* at 181-82 (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

74. See *supra* notes 45-51 and accompanying text.

party appealing.<sup>75</sup> Given the rules' inherent flexibility, Maryland courts have been properly hesitant to limit a party's appeal based on language "gratuitously included in the body of the order."<sup>76</sup> After *B & K Rentals*, this principle is even more firmly established.

In fact, the Court of Appeals specifically overruled *Carter v. State* "and other decisions to the same effect,"<sup>77</sup> which were "out of step" with the court's formulation.<sup>78</sup> Limiting language in a notice of appeal is to be treated as surplusage and will not defeat an appeal in Maryland.

4. *Conclusion.*—The *B & K Rentals* decision will prove valuable to Maryland courts and practitioners. The decision nicely clarifies the effect of post-judgment motions on both the finality of judgments, and the issues reviewable by appellate courts. More significantly, however, *B & K Rentals* states unequivocally that notices of appeal shall be construed liberally so as not to limit the issues on appeal. With this statement, Maryland continues the trend toward substance over form, and away from the days when a single misstep in pleading was fatal to a proper decision on the merits.

BRUCE T. CARTON

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75. *E.g.*, *Newman v. Reilly*, 314 Md. 364, 383, 550 A.2d 959, 968 (1988); *Williams v. Dawidowicz*, 209 Md. 77, 82, 120 A.2d 399, 401-02 (1956).

76. *Newman*, 314 Md. at 383, 550 A.2d at 969.

77. 319 Md. at 138, 571 A.2d at 1218.

78. *See id.* at 137, 571 A.2d at 1218.

### III. CONSTITUTIONAL LAW

#### A. Maryland's Single-Subject Rule

In *Porten Sullivan Corp. v. State*,<sup>1</sup> the Court of Appeals addressed the constitutionality of an act establishing ethical standards for Prince George's County council members in zoning matters, and extending the county's authority to impose energy and transfer taxes.<sup>2</sup> The court revived a rarely used provision of the Maryland Constitution to strike down the ethics portion of the act.<sup>3</sup> The court held that the act violated the state constitution's single-subject rule,<sup>4</sup> but it found that the ethics provisions were severable.<sup>5</sup> Consequently, the county's taxing authority as granted by the act was allowed to stand.<sup>6</sup>

The court's reliance on this often invoked<sup>7</sup> but seldom used doctrine<sup>8</sup> has several practical implications. The *Porten Sullivan* decision will force the legislature to approach cautiously any attempt to attach unpopular riders to strongly supported bills.<sup>9</sup> The decision will also remind the General Assembly when drafting new laws to be more explicit with regard both to their substantive content and to their titles.<sup>10</sup>

The court's striking down as unconstitutional the ethics portion of the law by invoking the single-subject doctrine is not as serious as invalidating the entire statute.<sup>11</sup> The bill's ethics portion may be re-

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1. 318 Md. 387, 568 A.2d 1111 (1990).

2. See Act of May 5, 1989, ch. 244, 1989 Md. Laws 2241; 318 Md. at 389, 568 A.2d at 1112.

3. See 318 Md. at 389, 568 A.2d at 1112.

4. See *id.* at 409, 568 A.2d at 1121-22; MD. CONST. art. III, § 29. The constitution states in relevant part: "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title[.]" *Id.*

5. See 318 Md. at 410-11, 568 A.2d at 1122.

6. See *id.* at 411, 568 A.2d at 1122; see *infra* note 109.

7. See *infra* notes 74-97 and accompanying text.

8. See *Porten Sullivan*, 318 Md. at 402, 568 A.2d at 1118. Prior to this case, the Court of Appeals used the provision to invalidate statutes only twice, in 1891 and 1911. See *Scharf v. Tasker*, 73 Md. 378, 21 A. 56 (1891); *Curtis v. Mactier*, 115 Md. 386, 80 A. 1066 (1911); see also Ruud, "No Law Shall Embrace More Than One Subject," 42 MINN. L. REV. 389, 447 (1958) ("[I]n only a handful of cases have the courts held an act to embrace more than one subject" (footnote omitted)).

9. See *infra* notes 110-113 and accompanying text.

10. See *State v. Norris*, 70 Md. 91, 96, 16 A. 445, 446 (1889) ("Many Acts are passed, and often of great importance, the titles of which are exceedingly deficient in definite and clear description of the subject-matter of the Act.")

11. The *Porten Sullivan Corporation's* original complaint alleged that the bill vio-

enacted under a separate act. Should this occur, the courts may again encounter the act, this time facing a constitutional challenge on the merits.<sup>12</sup>

1. *The Case.*—Chapter 244 of the 1989 Maryland Laws<sup>13</sup> began as an emergency measure designed to sustain Prince George's County's taxing authority by passing House Bill 889, to renew an energy tax,<sup>14</sup> and House Bill 890, to renew a transfer tax,<sup>15</sup> that were both scheduled to expire in the summer of 1989.<sup>16</sup> The House of Delegates passed the bills on March 6, 1989, with only one member opposing.<sup>17</sup> Near the end of March, after the House of Delegates passed a third bill involving Prince George's County, the controversy first began that led to addition of the lengthy ethics provisions.<sup>18</sup>

An attorney in the county sought the disqualification of five Prince George's County Council members after his neighborhood was rezoned.<sup>19</sup> He argued that these five council members received "political contributions from the zoning applicant's attorneys and other agents."<sup>20</sup> Concerned about these allegations, Prince George's County senators met with the attorney to discuss his proposed solutions to conflicts arising when council members received money from present or potential zoning applicants. Subsequent to

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lated several constitutional provisions; however, the court did not reach these issues. See *Porten Sullivan*, 318 Md. at 395, 568 A.2d at 1115; see also *infra* note 31 and accompanying text.

12. Re-enactment does not appear likely. Although the Prince George's County delegation introduced in the 1990 legislation two bills similar in nature to the ethics provision, see Md. H.B. 975, 1990 Sess.; Md. S.B. 832, 1990 Sess., neither passed. No similar bills were introduced in the 1991 session.

13. Act of May 5, 1989, ch. 244, 1989 Md. Laws 2241.

14. Md. H.B. 889, 1989 Sess. House Bill 889 concerned an energy tax, which if not extended would have resulted in a \$25 million loss to the county in the next fiscal year (1990). See *id.*; *Porten Sullivan*, 318 Md. at 393, 568 A.2d at 1114.

15. Md. H.B. 890, 1989 Sess. House Bill 890 extended an act already once prolonged, which provided a 0.5% increase in transfer taxes imposed on all county real property transactions. See *id.* For fiscal year 1990 alone, estimated revenues generated by continuing the increased tax totalled \$13.4 million. See 318 Md. at 393, 568 A.2d at 1114. The two taxes would generate funds to be directed to education and public safety, "those two budgetary areas making up about 70 percent of the county budget." *Id.*

16. See 318 Md. at 393, 568 A.2d at 1113-14.

17. See *id.* at 393-94, 568 A.2d at 1114.

18. The third bill, House Bill 891, authorized the county to levy impact fees on new developers to help finance construction of needed public facilities. See H.B. 891, 1989 Sess. This bill did not succeed, nor was it consolidated with the other bills into Chapter 244. See 318 Md. at 394-95, 568 A.2d at 1114.

19. See *Porten Sullivan*, 318 Md. at 394, 568 A.2d at 1114.

20. Brief of Appellants at 8, *Porten Sullivan* (No. 89-93) (footnote omitted).

this meeting, the county delegation combined the attorney's proposed ethics provisions with the energy and transfer tax bills, resulting in a completely revised single bill, House Bill 890.<sup>21</sup> The Senate passed the bill in its final form on April 6, 1989, and the House passed it four days later, on the regular session's final day.<sup>22</sup>

The ethics provision, applicable only to Prince George's County, governed zoning applications to the county council.<sup>23</sup> It provided that any applicant for a zoning exception or variance<sup>24</sup> must file with the application an affidavit disclosing campaign contributions<sup>25</sup> the applicant made to any Prince George's County Council member within the three preceding years. An applicant failing to disclose this information would be guilty of a misdemeanor, and subject to a \$1000 fine, a one year prison term, or both.<sup>26</sup> The provision also imposed a corresponding duty upon county council members to disclose any contributions they received from the applicant within the three years preceding the zoning application. Any council member receiving such a contribution would be disqualified from participating in voting on that application.<sup>27</sup>

Porten Sullivan Corporation (Porten Sullivan) opposed the bill because of the corporation's extensive involvement in the county. Porten Sullivan was a self-described "Maryland corporation engaged in the building and development of award-winning residential properties and communities," and carried on over a quarter of its business in Prince George's County.<sup>28</sup> As a result, the corporation frequently filed zoning applications in the county.<sup>29</sup> Porten Sullivan was also a "politically active" corporation, and made contributions totalling \$625 to four members of the County Council over the course of approximately three years.<sup>30</sup>

Porten Sullivan initiated a suit against the State of Maryland, Prince George's County, and other parties involved in county zoning, raising numerous constitutional challenges against the bill.<sup>31</sup>

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21. See 319 Md. at 394-95, 568 A.2d at 1114; Md. H.B. 890, 1989 Sess. (emergency bill).

22. See 319 Md. at 395, 568 A.2d at 1114-15.

23. See Act of May 5, 1989, ch. 244, 1989 Md. Laws 2241.

24. The term "applicant" potentially includes the applicant's spouse or child, and any business organization in which the applicant holds an interest. See *id.*

25. Contributions include money, goods, and services. See *id.*

26. See *id.*

27. See *id.*

28. Brief of Appellants at 4, *Porten Sullivan* (No. 89-93) (footnote omitted).

29. See 318 Md. at 395, 568 A.2d at 1115.

30. See Brief of Appellants at 5, *Porten Sullivan*, (No. 89-93).

31. See 318 Md. at 395, 568 A.2d at 1115. With regard to the United States Constitu-



The trial court dismissed the suit on the defendants' summary judgment motion. The Court of Appeals granted certiorari before the Court of Special Appeals considered the case, and reversed the trial court's judgment, basing its holding solely on the Maryland Constitution's single-subject rule.<sup>32</sup>

2. *Legal Background.*—Forty-one state constitutions bar legislative enactment of bills concerning more than one subject.<sup>33</sup> A majority of the states have general single-subject provisions, though some exempt particular types of bills.<sup>34</sup>

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tion, Porten Sullivan alleged that the ethics legislation abridged the rights of free speech and association, *see* Brief of Appellants at 15, *Porten Sullivan* (No. 89-93); that the act was overly broad and vague, *see id.* at 20; and that it created "legislative classifications that unconstitutionally den[ie]d appellants' equal protection of the laws," *id.* at 35.

With regard to Maryland law, Porten Sullivan alleged that the legislation violated Article XI-A of the Maryland Constitution, which creates home rule powers, and which the appellants contended gives power to devise legislation such as the ethics provision to the counties, and not the General Assembly. *See id.* at 37. They also argued that the legislation violated the single-subject rule, and the separation of powers doctrine under Article 8 of the Maryland Declaration of Rights. *See id.* at 42, 46. Porten Sullivan contended that granting power to the circuit court "to determine whether to void the illegal zoning action 'if the court deems voiding the action to be in the best interest of the public,'" vested improper power in the courts and allowed them to encroach on the legislative role of determining the public's best interests. *Id.* at 46.

It is interesting to note that Porten Sullivan devoted most of its brief to attacking the ethics legislation on federal constitutional grounds; its attack on the single-subject issue constituted a very small portion of its argument. *See id.* at 44-46.

32. *See Porten Sullivan*, 318 Md. at 396, 568 A.2d at 1115.

33. *See* ALA. CONST. art. IV, § 45; ALASKA CONST. art. II, § 13; ARIZ. CONST. art. IV, pt. 2, § 13; CAL. CONST. art. IV, § 9; COLO. CONST. art. V, § 21; DEL. CONST. art. II, § 16; FLA. CONST. art. III, § 6; GA. CONST. art. III, § 5, par. 3; HAW. CONST. art. III, § 14; IDAHO CONST. art. III, § 16; ILL. CONST. art. IV, § 8; IND. CONST. art. IV, § 19; IOWA CONST. art. III, § 29; KAN. CONST. art. II, § 16; KY. CONST. § 51; LA. CONST. art. III, § 15; MICH. CONST. art. IV, § 24; MINN. CONST. art. IV, § 17; MO. CONST. art. III, § 23; MONT. CONST. art. V, § 23; NEB. CONST. art. III, § 14; NEV. CONST. art. IV, § 17; N.J. CONST. art. IV, § 7, par. 4; N.M. CONST. art. IV, § 16; N.Y. CONST. art. III, § 15; N.D. CONST. art. IV, § 33; OHIO CONST. art. II, § 15; OKLA. CONST. art. V, § 57; OR. CONST. art. IV, § 20; PA. CONST. art. III, § 3; S.C. CONST. art. III, § 17; S.D. CONST. art. III, § 21; TENN. CONST. art. II, § 17; TEX. CONST. art. III, § 35; UTAH CONST. art. VI, § 22; VA. CONST. art. IV, § 12; WASH. CONST. art. II, § 19; W.VA. CONST. art. VI, § 30; WIS. CONST. art. IV, § 18; WYO. CONST. art. III, § 24. States without a single-subject provision are Arkansas, Connecticut, Maine, Massachusetts, Mississippi, New Hampshire, North Carolina, Rhode Island, and Vermont.

*See also* N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 17.01 (4th ed. 1985). Although the United States Constitution contains no such provision, similar restrictions exist in Congress' procedural rules. *See, e.g.,* Rules of the House of Representatives of the United States, 101st Cong., Rule XVI(7) ("[N]o motion or proposition on a subject different from that under consideration shall be admitted under color of amendment."). For a more thorough discussion, *see* Bach, *Germaneness Rules and Bicameral Relations in the U.S. Congress*, 7 LEGIS. STUD. Q. 341 (1982).

34. A common example of such an exemption is general appropriations bills, which

a. *Purpose*.—Prohibiting multi-subject bills prevents legislative “log-rolling”: the alliance of several minority interest groups to create a bill that embraces their collective objectives, thus resulting in a majority vote that would have been uncertain if the proposals each had been represented in separate bills.<sup>35</sup> The prohibition also prevents the related practice of attaching riders to highly popular bills, thereby forcing adoption of the undesirable portion so that the original bill’s vitality may be sustained.<sup>36</sup> Furthermore, restricting bills to a single subject protects the governor’s veto powers, because the veto generally extends only to whole bills.<sup>37</sup> The single-subject rule may serve other purposes, such as keeping the public aware of the content of bills being enacted into law and “facilitat[ing] an orderly and rational legislative process.”<sup>38</sup>

Also important, although only mentioned briefly in the *Porten Sullivan* opinion, is the requirement in most constitutional provisions that a bill’s subject be expressed in its title.<sup>39</sup> The title provision is usually treated as a doctrine separate from the single-subject

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often are exempted from the one-subject provision and then specifically restricted with particular provisions in the state constitution. See, e.g., ALA. CONST. art. 4, § 45 (excepting general appropriation bills and general revenue bills); OKLA. CONST. art. 5, § 57 (excepting general appropriation and revenue bills). The reasoning for creating a specific constitutional provision with respect to such bills is that “the general appropriations bill presents a special temptation for the attachment of riders. It is a necessary and often popular bill which is certain of passage.” Ruud, *supra* note 8, at 413.

Exceptions such as this often are not true exemptions of a particular type of bill from the one-subject rule, but rather are explicit declarations within the constitutional provision that the exempted subject is itself one subject. See *id.* at 444-46. For example, an Alabama court interpreted the exception of general revenue bills from the one-subject requirement as a declaration that a general revenue bill concerns a single subject, despite the possible inference that it embraces a number of subjects. See *Harris v. State ex rel Williams*, 228 Ala. 100, 104, 151 So. 858, 861 (1934).

35. *Porten Sullivan*, 318 Md. at 399, 568 A.2d at 1116; *Parkinson v. State*, 14 Md. 184, 193 (1859); see also *Gellert v. State*, 522 P.2d 1120, 1122 (Alaska 1974) (describing “the primary aim of ‘one-subject’ provisions in state constitutions [as] restraint of log-rolling in the legislative process”); Ruud, *supra* note 8, at 391 (explaining the method of log-rolling by minority groups).

36. See 318 Md. at 399, 568 A.2d at 1116; *Davis v. State*, 7 Md. 151, 160 (1854). The Court of Appeals faulted the bill for violating this principle. The court explained that “the delegates from Prince George’s County were put in precisely the position from which the one-subject clause was intended to protect them: the necessity ‘for a legislator to acquiesce in [a possibly] undesirable bill in order to secure useful and necessary legislation.’ ” *Id.* at 409, 568 A.2d at 1121 (citation omitted).

37. See R. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 809 (1987).

38. Ruud, *supra* note 8, at 451.

39. 318 Md. at 402, 407, 568 A.2d at 1118, 1120-21. Of the state constitutions containing single-subject provisions, see *supra* note 33, all but those of Illinois and Indiana also impose the title requirement in the same section.

rule.<sup>40</sup> This requirement ensures that the legislature and the public are aware of all subjects included in the legislation.<sup>41</sup>

*b. Judicial Enforcement.*—Although single-subject provisions serve important purposes, judicial enforcement of these provisions has been relatively rare.<sup>42</sup> The principle that legislative acts enjoy a presumption of validity has inhibited exercise of the single-subject rule; a statute generally will be struck down only if it manifestly contravenes the rule's purpose.<sup>43</sup> Furthermore, courts are reluctant to intrude upon the legislative domain; they do not wish to belittle or embarrass the legislature by implying that it has passed a bill through questionable means of log-rolling, or by using subversive techniques to sneak a rider through passage.<sup>44</sup>

The cornerstone of judicial interpretation of the single-subject rule in Maryland is the case of *Davis v. State*,<sup>45</sup> which laid down the principles upon which the rule was based. The *Davis* court was asked to strike down an act titled "An act to regulate inspections in the city of Baltimore,"<sup>46</sup> on the ground that the act altered specific provisions of an earlier statute concerning inspection of tree bark intended for export.<sup>47</sup> The appellant argued that the new act could not change the old law without a specific repealer.<sup>48</sup> He also argued that the new act's modifications were not expressly stated in its title, nor were they aligned with the bill's general subject.<sup>49</sup> Ruling for the State, the court echoed the single-subject law's objectives: to prevent the attachment of riders to strongly supported bills in order to secure passage of less popular provisions; to protect the people from being hurt by such a practice; and to protect the legislators

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40. See, e.g., *Harbor v. Deukmejian*, 43 Cal. 3d 1078, 1096, 742 P.2d 1290, 1300, 240 Cal. Rptr. 569, 579 (1987) (in California, the one-subject requirement and the title requirement are "independent provisions which serve separate purposes"). But see Ruud, *supra* note 8, at 391-92 (even though the two doctrines have independent historical reasons for their existence, and were intended to serve different functions, they often are treated together when speaking of their purposes).

41. See Ruud, *supra* note 8, at 391-92. The title requirement's origins suggest that it is more specifically aimed at "prevent[ing] legislation by stealth," whereas the one-subject provision serves the more general purposes enumerated above. See *id.*

42. See *supra* note 8.

43. See, e.g., *County Comm'rs v. Meekins*, 50 Md. 28, 40 (1878) ("an Act will not be held to be unconstitutional, unless it is in such plain conflict with some provision of the Constitution as to leave no discretion to the Court in the premises.").

44. See Ruud, *supra* note 8, at 393-94.

45. 7 Md. 151 (1854).

46. Act of May 10, 1854, ch. 200, 1854 Md. Laws 254; see 7 Md. at 152.

47. See 7 Md. at 152.

48. See *id.* at 154.

49. See *id.* at 159-60.

from being tricked into supporting bills of whose content they may have been unaware.<sup>50</sup> The court often has repeated these purposes in subsequent opinions, but it has infrequently applied the single-subject rule to strike down a legislative act.<sup>51</sup>

c. *Tests*.—To overcome the standard presumption of legislative validity, the courts may apply several tests to define the necessary limitations of a bill conforming with the one-subject rule. The word “subject” may be construed several ways, and courts in various jurisdictions have embraced different tests to determine subject matter germaneness. For example, in Indiana, a bill may be struck down only when the bill embraces “two or more subjects, having no legal connection with each other.”<sup>52</sup> Most tests are similarly ambiguous, such as the Minnesota requirement that the subjects at issue have “a logical or natural connection.”<sup>53</sup> When such an act is at issue, the strong presumption favoring the legislature results in tests that are liberal and open ended.<sup>54</sup>

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50. *See id.* at 160; *see also* *Nutwell v. Anne Arundel County*, 110 Md. 667, 671, 73 A. 710, 712 (1909) (striking down an act on the basis of the title provision, and explaining that one of the one-subject rule’s purposes was fairly to advise “the Legislature and the people . . . of the real nature of pending legislation.” (quoting *State v. Norris*, 70 Md. 91, 95-96, 16 A. 445, 446 (1889))).

51. *See* *Everstine, Titles of Legislative Acts*, 9 MD. L. REV. 197, 216 (1948). A recent court opinion illustrating this cursory treatment of the single-subject provision is *Whiting-Turner Contracting Co. v. Coupard*, 304 Md. 340, 499 A.2d 178 (1985), in which the court’s twenty page opinion gave a scant one page summary of Article 3, section 29’s history. *See id.* at 361, 499 A.2d at 189. Application of the one-subject provision to the facts of the case consisted of one sentence: “The bill is germane to the single subject of time bars against claims arising out of Injury [sic].” *Id.*, 499 A.2d at 190; *see infra* note 57.

52. *Grubbs v. State*, 24 Ind. 295, 297 (1865).

53. *Johnson v. Harrison*, 47 Minn. 575, 577, 50 N.W. 923, 924 (1891).

54. The *Johnson* court explained that:

To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects that by no fair intentment can be considered as having any legitimate connection with or relation to each other. All that is necessary [for the act to comply with the single-subject provision] is that the act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject.

*Id.* (emphasis added).

Occasionally courts find that an act violates the one-subject rule when, to a layperson, it seems to address just one subject. In *Moore v. Police Jury of Bossier Parish*, 32 La. Ann. 1013 (1880), the Louisiana court struck down an act that “prescrib[ed] the manner of changing parish lines and of removing parish seats.” *Id.* at 1014 (emphasis added). The court held that changing parish lines was a subject distinct from that of moving parish seats because the Louisiana Constitution referred to “all laws changing parish lines or removing parish seats . . .” *Id.* at 1015. The court held the statute void

Addressing the act in question, the *Davis* court characterized the test as "relat[ing] to inspections, and to such other matters only as are inseparably connected with it, and to none other . . . ." <sup>55</sup> Considering the possibility of a stricter standard, the court continued, "[i]t could hardly be successfully urged against a law, that it does not embrace and dispose of *the whole subject* to which it relates. If it could be, few laws, if any, could stand such a test." <sup>56</sup> In a later case, the court adopted as an additional means of interpretation the test of germaneness; this test is met if "several sections of the law refer to and are *germane* to the same subject-matter." <sup>57</sup>

These tests, like those used in other jurisdictions, indicate the courts' strong reluctance to strike down a legislative act. <sup>58</sup> Courts are predisposed "to uphold rather than defeat the enactment wherever possible." <sup>59</sup> After giving the legislature this leeway, a court will only strike down a statute if it is "plainly repugnant to the Constitution." <sup>60</sup>

d. *Application in Maryland Case Law.*—Before the *Porten Sullivan* decision, Maryland courts used the one-subject rule to strike down only two acts. <sup>61</sup> In *Sharf v. Tasker*, <sup>62</sup> the first of these cases, the

even though the two subjects had a "logical and natural connection," even without the benefit of a liberal construction. *See id.* at 1017.

55. 7 Md. at 160; *see also* County Comm'rs v. Meekins, 50 Md. 28, 41 (1878) ("to render a law obnoxious to [the single-subject rule], there must be engrafted upon a law of a *general* nature, some subject of a private or local character, or that two or more dissimilar and discordant subjects must be legislated upon the same law." (emphasis in original)).

56. *Davis*, 7 Md. at 160 (emphasis in original).

57. Mayor of Baltimore v. Reitz, 50 Md. 574, 579 (1879) (emphasis in original); *see also* Whiting-Turner Contracting Co. v. Coupard, 304 Md. 340, 361, 499 A.2d 178, 190 (1985) (an act concerning both a statute of limitations and a bar on certain unrelated causes of action after a certain number of years "is germane to the single subject of time bars against claims arising out of Injury [sic]," even though the former was a conventional statute of limitations and the latter bar was a grant of immunity).

58. *See, e.g.,* Scharf v. Tasker, 73 Md. 378, 383, 21 A. 56, 57 (1891) ("A liberal construction has always been placed upon [the single subject provision], so as to uphold, rather than strike down, enactments passed by the General Assembly.").

59. Allied Am. Mut. Fire Ins. Co. v. Commissioner of Motor Vehicles, 219 Md. 607, 614, 150 A.2d 421, 426 (1959).

60. Neuenschwander v. Washington Suburban Sanitary Comm'n, 187 Md. 67, 79, 48 A.2d 593, 599 (1946).

61. *See supra* note 8. The *Porten Sullivan* court mentioned a third case, *Ellicott Machine Co. v. Speed*, 72 Md. 22, 18 A. 863 (1889), in which the court ruled that corporations were not subject to the employee wage payment provisions of an act governing insolvent employers. *See id.* at 24, 18 A. at 863-64. In dictum, the *Ellicott* court noted that if corporations had been subjected to the statute, it would then have "add[ed] a new feature to the insolvent laws, and . . . then the Act would embrace more than one subject, and be in direct conflict with the Constitution[.]" *Id.* at 25, 18 A. at 864.

Court of Appeals held that an act concerning assessment, taxation, and sale of unclaimed military land lots<sup>63</sup> contained a "repeal by mere implication"<sup>64</sup> of a previous act. The court struck down the act, reasoning that a "proposed or attempted repeal is in no sense germane to the subject-matter disclosed or described in the title."<sup>65</sup> The court also found that a provision remitting certain sums collected under the act's authority had "nothing at all to do with the object and purpose of the statute."<sup>66</sup> Although the court based its decision on both the one-subject requirement and the title requirement, the line between the two was indistinct.<sup>67</sup> It appears, however, that the decision could have been made wholly on the basis of the one-subject rule.<sup>68</sup>

In the second case employing the one-subject rule to strike down a statute, *Curtis v. Mactier*,<sup>69</sup> the Court of Appeals interpreted an act "to incorporate the Village of Chevy Chase, in Montgomery County, Maryland."<sup>70</sup> The act contained a section that gave to the Montgomery County Commissioners certain taxing powers.<sup>71</sup> The court held that this section "contain[ed] provisions which . . . have never been embraced in any municipal charter in this State, and which are . . . not germane to the object and purposes of an ordinary municipal charter."<sup>72</sup> The infrequent use of Maryland's one-subject provision prior to *Porten Sullivan* illustrates the courts' strong tendency to construe statutes as liberally as possible, and to grant the legislation a strong presumption of validity.<sup>73</sup>

An examination of Maryland statutes that have withstood constitutional attack helps explain the distinctions courts draw. In *Par-*

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62. 73 Md. 378, 21 A. 56 (1891).

63. See Act of March 10, 1874, ch. 66, 1874 Md. Laws 66.

64. 73 Md. at 384, 21 A. at 57.

65. *Id.*

66. *Id.* at 385, 21 A. at 57.

67. See *supra* note 40.

68. See 73 Md. at 384, 21 A. at 57.

69. 115 Md. 386, 80 A. 1066 (1911).

70. Act of April 8, 1910, ch. 382, 1910 Md. Laws 983.

71. See *id.* § k.

72. 115 Md. at 393, 80 A. 1066, 1068. The court quoted at length the trial court's opinion, which said,

The statement of [the act's] purpose as being merely to 'incorporate the village of Chevy Chase', can not by any construction be held sufficient to include legislation which contemplates action by entirely separate agencies, and which might have been effectually enacted without the incorporation of the municipality.

*Id.* at 393-94, 80 A. at 1069.

73. See Everstine, *supra* note 51, at 216-18.

*kinson v. State*,<sup>74</sup> the Court of Appeals examined whether an act that by its title prohibited liquor sales but also in its text prohibited the giving of liquor, embraced more than one subject.<sup>75</sup> The court upheld the act against both one-subject and title challenges, and explained the principle underlying the constitutional provision:

Whilst it is certainly proper that this provision should be so construed as to prevent a repetition of the evils which it was designed to prohibit, it is no less proper to avoid the opposite extreme, the necessary effect of which would be, in many instances, greatly to embarrass the Legislature in the discharge of their duties, and would also be calculated to produce much controversy in regard to the validity of many laws.<sup>76</sup>

Although one could literally interpret the act as having two subjects—sale and gift—the court explained that “we cannot suppose the sale of [liquor] was the chief mischief designed to be prevented, but the procurement of it in any way.”<sup>77</sup> Consequently, liquor procurement was the act’s single subject, rather than a specific method of acquisition.

The court might have used a strict application of the single-subject provision to strike down a statute in numerous cases, but instead upheld the statute’s validity. In *Catholic Cathedral v. Manning*,<sup>78</sup> the court examined an act giving Baltimore City authority to build streets on land that had been a church cemetery.<sup>79</sup> Although this process ultimately involved a number of separate geographical and temporal phases,<sup>80</sup> the court held all parts to be germane to the act’s general subject—creation of new roads on cemetery land.<sup>81</sup> The court explained that “the subject of the statute is confounded with the mere details or interdependent acts prescribed by the statute, and authorized to be done in carrying into effect the subject-matter itself . . . . There is no foreign, irrelevant, or discordant matter in-

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74. 14 Md. 184 (1859).

75. See Act of Feb. 17, 1858, ch. 55, 1858 Md. Laws 58.

76. 14 Md. at 194.

77. *Id.* at 195-96.

78. 72 Md. 116, 19 A. 599 (1890).

79. See Act of April 7, 1886, ch. 280, 1886 Md. Laws 449.

80. Because prior law had forbidden such city action, the new act repealed the old laws, and provided for removal of the remains interred where the streets would be built. 72 Md. at 120, 19 A. at 600. Human remains buried in cemetery land rendered unsuitable for its original purpose because of the proximity of new roads also were to be “relocated.” The act granted this adjacent land to the city because it no longer would be needed. See *id.* at 120-21, 19 A. at 600.

81. See *id.* at 133, 19 A. at 604.

corporated in the statute."<sup>82</sup>

In *Price v. Liquor License Commissioners*,<sup>83</sup> an act entitled "An Act to enable the registered qualified voters of Cecil County to determine by ballot whether spirituous or fermented liquors or cider shall be sold in said county,"<sup>84</sup> survived a single-subject attack.<sup>85</sup> Although the act contained two sets of provisions, only one would come into effect, contingent on the results of the citizens' referendum.<sup>86</sup> The court held that because the constitutional provision "has always received a liberal construction,"<sup>87</sup> the act could not "be said to embrace distinct subjects of legislation."<sup>88</sup>

In the same term, the court upheld an act that limited expenditures on public highways in Talbot County.<sup>89</sup> The act contained a provision involving not just highways, but also bridges.<sup>90</sup> The court allowed the act to stand, and found that "highway" was a general term embracing bridges as well as roads.<sup>91</sup>

In a more recent case, *Madison National Bank v. Newrath*,<sup>92</sup> the court found that the Uniform Commercial Code (UCC) of Maryland<sup>93</sup> conforms to the one-subject rule.<sup>94</sup> The court cited several factors supporting its decision. The code's uniform nature, as indicated by its title, notifies a reader of its comprehensiveness; the act "contains no incongruous or unrelated features";<sup>95</sup> a special commission appointed by the governor gave serious consideration to the UCC's enactment; and the UCC received widespread publicity in the two years before it was enacted, which implies that the bill's nature was clear to anyone concerned.<sup>96</sup> The court concluded that the UCC was "not the evil against which [the single-subject provision] . . . was designed to protect the public and the legislature."<sup>97</sup>

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82. *Id.*

83. 98 Md. 346, 57 A. 215 (1904).

84. Act of April 9, 1898, ch. 532, 1898 Md. Laws 1273.

85. 98 Md. at 351, 57 A. at 217.

86. See ch. 532, 1898 Md. Laws 1273.

87. 98 Md. at 351, 57 A. at 217.

88. *Id.* at 352-53, 57 A. at 217.

89. See *County Comm'rs of Queen Anne's County v. County Comm'rs of Talbot County*, 99 Md. 13, 57 A. 1 (1904); Act of April 8, 1902, ch. 300, 1902 Md. Laws 420.

90. See ch. 300, 1902 Md. Laws 420.

91. See 99 Md. at 20-21, 57 A. at 3.

92. 261 Md. 321, 275 A.2d 495 (1971).

93. See MD. COM. LAW CODE ANN. § 1-101 *et seq.* (1975).

94. See 261 Md. at 336, 275 A.2d at 503.

95. *Id.* at 339, 275 A.2d at 504.

96. See *id.* at 337-39, 275 A.2d at 503-04.

97. *Id.* at 339, 275 A.2d at 504.



### 3. Analysis.—

a. *Comparison.*—As compared with these cases addressing compliance with the single-subject rule, the facts in *Porten Sullivan* align more closely with those statutes that were struck down. The statutes that were upheld contained no hint of legislative misbehavior—in contrast to the controversy surrounding House Bill 890.<sup>98</sup> Furthermore, the *Porten Sullivan* bill's scope goes beyond that of acts that have withstood a constitutional attack; i.e., the bill's ethics provisions and tax provisions appear to be totally unrelated.<sup>99</sup>

Many Maryland bills that survived constitutional attack contained two subjects with a relatively clear common link. For example, highways and bridges are closely related;<sup>100</sup> and gift and sale are two ways of conveying a particular item.<sup>101</sup> In *Catholic Cathedral*, the temporal interdependence of certain events caused them to fall within the same subject's purview.<sup>102</sup> In each of these cases, intuitive reasoning allows the two subjects to be linked without violating the single-subject rule.

But no such logical link existed between the *Porten Sullivan* bill's elements. The subjects of political ethics and taxation are not ones that most people would connect, knowing nothing else about them. Although the appellees contended that the two subjects were sufficiently related because "the Act deals generally with Prince George's County government,"<sup>103</sup> the court pointed out that the case on which the appellees relied was not dispositive. In that case, *County Commissioners v. Meekins*,<sup>104</sup> the court upheld an act establishing Dorchester County's governmental structure.<sup>105</sup> The act created a system of tax levy and collection, and also described the duties of the county commissioners, treasurer, and tax collectors.<sup>106</sup> The court explained that these subjects were "closely connected and [made] to depend each upon the other . . . ."<sup>107</sup>

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98. See *supra* note 36.

99. Compare *supra* notes 74-97 and accompanying text (discussing acts that have withstood single subject attack).

100. See *County Comm'rs of Queen Anne's County v. County Comm'rs of Talbot County*, 99 Md. 13, 57 A. 1 (1904); *supra* notes 89-91 and accompanying text.

101. See *Parkinson v. State*, 14 Md. 184 (1859); *supra* notes 74-77 and accompanying text.

102. See 72 Md. 116, 19 A. 599 (1890); *supra* notes 78-82 and accompanying text.

103. 318 Md. at 404, 568 A.2d at 1119.

104. 50 Md. 28 (1878).

105. See *id.* at 42-43; Act of March 27, 1878, ch. 160, 1878 Md. Laws 262.

106. See ch. 160, 1878 Md. Laws 262.

107. 50 Md. at 42.

The same cannot be said of the Prince George's County bill in *Porten Sullivan*. There was no interdependence between taxing authority and the ethics provision. Moreover, the fact that the ethics provision was added to House Bill 890 long after the bill's inception indicated that the two were wholly unrelated.<sup>108</sup> Finally, the court was able to sever the ethics provision and allow the tax provisions to stand, and this supports the idea that the two were not closely connected.<sup>109</sup>

Perhaps if the court reviewed single-subject challenges with greater deference to the legislature, House Bill 890 would have survived. The court might have accepted the argument that the act addressed the single subject of governing Prince George's County. Under the standard that now prevails, however, the court simply could not have done this. The tests of germaneness and "logical and natural connection" inject a common sense element: is it intuitively reasonable and sensible for the two subjects at issue to be linked in a single bill? The answer in *Porten Sullivan* was necessarily no.

*b. Consequences.*—The *Porten Sullivan* decision joins but two others that have enforced the Maryland Constitution's one-subject provision. The decision is unlikely to effect a radical change in the Court of Appeals' view on the rule. Indeed, the court reinforced the one-subject rule's previously recognized principles.<sup>110</sup> Given that the rule has not been enforced for nearly eighty years, it needed

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108. See *supra* note 21 and accompanying text.

109. A court rarely rules that one part of an act is severable, and that the other portion is still good law. See Ruud, *supra* note 8, at 399. Professor Ruud cited only one circumstance in which this is proper—when a rider has been attached to a popular bill.

Where it is clear that a provision dealing with an unrelated subject had this tactical relationship to the rest of the act, it seems to be consistent with the rationale of the one-subject rule to hold only the rider invalid. The troublesome question, though, would seem to be one of determining when this situation exists.

*Id.* at 400. The *Porten Sullivan* court found the provisions severable, suggesting that the ethics portion was added on because the taxing provisions were so certain to pass. After first establishing that there is a "'strong presumption'" that the legislature favors severability, 318 Md. at 410, 568 A.2d at 1122 (quoting *State v. Burning Tree Club, Inc.*, 315 Md. 254, 297, 554 A.2d 366, 387 (1989)), the court concluded that the taxing measures "were the original, true, and dominant subject of what eventually became Chapter 244. The 'ethics' provisions were incongruous and discordant additions, 'foreign or irrelevant matter,' unconnected in subject-matter to the 'tax' provisions, and [therefore] unconstitutional." 318 Md. at 410-11, 568 A.2d at 1122. The court also cited the bill's legislative history, which further supported a finding that the legislative intent was to make the ethics and taxing provisions severable. See *id.* at 411 n.8, 568 A.2d at 1122 n.8.

110. See 318 Md. at 401-03, 568 A.2d at 1117-18.

rejuvenation. Because the bill's two provisions were related only by virtue of their application to the same county, *Porten Sullivan* was a proper case for applying the rule. It is unlikely, however, that the decision will result in a rush of litigation on the point. Although the rule often is cited in Maryland and in other jurisdictions, it is not usually a primary issue.<sup>111</sup>

If the legislature wishes to keep the ethics provision, it must now re-enact it separately. This appears unlikely at present.<sup>112</sup> If the ethics provision were to pass a second time, it could again reach the courts, particularly given the numerous other constitutional attacks raised in this appeal.<sup>113</sup>

4. *Conclusion.*—Although the one-subject rule may be, to the litigator, "a weak and undependable arrow in his quiver"<sup>114</sup> because courts so rarely depend upon it, its presence may have something of an *in terrorem* effect upon the legislature. That is, the rule is seldom applied because the legislature is careful not to breach it. If that is the case, the *Porten Sullivan* decision will reinforce this legislative caution. Even if the effect is not so strong, *Porten Sullivan* serves the important purpose of rejuvenating a valid part of the Maryland Constitution, and reassuring the public and the legislature that the provision should be taken seriously.

*B. Non-Emergency Medication of Involuntarily Committed Mental Patients*

In *Williams v. Wilzack*,<sup>115</sup> the Court of Appeals held unconstitutional a statute allowing forcible, non-emergency medication of an involuntarily committed mental patient<sup>116</sup> because it failed to provide necessary procedural due process protections.<sup>117</sup> The court applied federal law to dispose of the statute on narrow grounds, and did not reach the complex issues that have eluded precise definition in the federal courts. The court recognized, as have federal courts, that an involuntarily committed mental patient has a constitutionally protected liberty interest in being free from arbitrary administration of antipsychotic drugs.<sup>118</sup>

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111. See Ruud, *supra* note 8, at 452.

112. See *supra* note 12.

113. See *supra* note 31.

114. Ruud, *supra* note 8, at 447.

115. 319 Md. 485, 573 A.2d 809 (1990).

116. See MD. HEALTH-GEN. CODE ANN. § 10-708(a) (1990).

117. See 319 Md. at 509-10, 573 A.2d at 821.

118. See *id.* at 508, 573 A.2d at 820.

The procedural protections accorded to secure this interest depend on the scope of that right, an issue that the court did not specifically address. Instead, the court applied federal law to the case's facts, and implied that a patient's substantive rights, and their procedural safeguards, are the same under Maryland and federal law.

1. *The Case.*—In October 1986, Laquinn Williams was committed to a state psychiatric institution for evaluation of his competence to stand trial on criminal charges of second degree attempted rape and battery.<sup>119</sup> After he was found competent to stand trial, Williams pleaded and was pronounced not criminally responsible under Maryland's Health-General Article, section 12-108.<sup>120</sup> In accordance with this verdict, the trial court committed Williams to a state psychiatric institution for care and treatment.<sup>121</sup>

In July 1987, Williams' treating psychiatrist prescribed Mellaril, an antipsychotic drug. Williams refused to take the drug, claiming it would alter his thought processes and interfere with the exercise of his religion, as well as his ability to assist his attorney at a subsequent release hearing.<sup>122</sup>

Pursuant to the Health-General Article, section 10-708, a clinical review panel met in August to review Williams' refusal to

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119. See *Williams*, 319 Md. at 489, 573 A.2d at 810-11. Williams was committed to Clifton T. Perkins Hospital Center, operated by the Maryland State Department of Health and Mental Hygiene. See *id.* at 488-89, 573 A.2d at 810.

120. See *id.* at 489, 573 A.2d at 810-11; MD. HEALTH-GEN. CODE ANN. § 12-108(a) (1990). Section 12-108 provides in relevant part:

A defendant is not criminally responsible for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder or mental retardation, lacks substantial capacity:

- (1) To appreciate the criminality of that conduct; or
- (2) To conform that conduct to the requirements of the law.

*Id.*

121. *Williams*, 319 Md. at 489, 573 A.2d at 811. The law provides that "after a verdict of not criminally responsible, the court immediately shall commit the defendant to the Department [of Health & Mental Hygiene] for institutional, inpatient care or treatment." MD. HEALTH-GEN. CODE ANN. § 12-111(a) (1990). An individual so committed is to be discharged "only if that individual would not be a danger, as a result of mental disorder or mental retardation, to self or to the person or property of others if discharged." *Id.* § 12-113(b). Thus, the state's interest in committing an individual to a mental health facility is to provide care and treatment, and to protect the public.

122. *Williams*, 319 Md. at 490, 573 A.2d at 811. For a discussion of the intrusive nature and side effects of antipsychotic drugs, see Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U.L. REV. 461, 474-79 (1977); see also Blackburn, *The "Therapeutic Orgy" and the "Right to Rot" Collide: The Right to Refuse Antipsychotic Drugs Under State Law*, 27 HOUS. L. REV. 447, 508-13 (1990) (listing the neurological and behavioral side effects induced by antipsychotic drugs).

take the drug.<sup>123</sup> The panel gave Williams only five minutes notice of the hearing, and allowed him to be present just long enough to explain why he refused to take the drug. The panel did not give Williams or his lawyer the opportunity to present evidence or to cross-examine witnesses.<sup>124</sup>

The panel unanimously determined that Williams should be required to take the medication notwithstanding his objections, and he was forcibly medicated for the next two-and-one-half weeks. Williams expressed his intention to obtain an ex parte injunction against the forcible medication, and in response, the State agreed to discontinue it and to review Williams' case a second time.<sup>125</sup>

On September 15, 1987, a second panel reviewed the case and unanimously recommended that Williams be medicated over his objections.<sup>126</sup> Williams responded by filing in the Circuit Court for

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123. See MD. HEALTH-GEN. CODE ANN. § 10-708 (a)-(b) (1990), entitled "Refusal of medication; clinical review panel," which reads as follows:

(a) *Election to refuse medication; exceptions.*—An individual in a facility may elect to refuse medication used for the treatment of a mental disorder except:

(1) When the medication is provided on the order of a physician in an emergency where the individual presents a danger to the life or safety of the individual or others; or

(2) In nonemergency situations, where the individual is hospitalized involuntarily or by order of a court and the medication is approved by a clinical review panel.

(b) *Composition of panel.*—(1) The clinical review panel consists of the following members appointed by the clinical director:

(i) The clinical director if the clinical director is a physician or a physician designated by the clinical director;

(ii) A psychiatrist; and

(iii) A nonphysician mental health care provider.

(2) If a member of the clinical review panel also is directly responsible for implementing the individualized treatment plan for the individual under review, the clinical director shall designate another panel member for that specific review.

*Id.*

124. *Williams*, 319 Md. at 509, 573 A.2d at 821. The panel gave Williams' attorney 45 minutes notice of the hearing. Section 10-708 did not provide for advance notice or an opportunity to defend. See *id.* For the statute's text, see *infra* note 127.

125. See 319 Md. at 490, 573 A.2d at 811.

126. See *id.* at 491, 573 A.2d at 812. The panel found that Williams' symptoms hampered his capacity to make reasonable treatment decisions, and that his " 'high degree of suspicion' " would prevent him from benefiting from any of the " 'talking therapies' " recommended by Williams' privately engaged psychiatrist. See *id.* The panel concluded that medication was " 'the most appropriate type of intervention compatible with this patient's well being,' " *id.*, and that medication might improve Williams' mental state and make him agreeable to future treatment with other types of therapy. Finally, the panel stated that withholding treatment would "lengthen the time of hospitalization, maintain the barrier to relating with others, and perhaps allow Mr. Williams to further disintegrate." *Id.*

Montgomery County an action against the State, alleging that forcible medication under the procedures of section 10-708<sup>127</sup> violated his state and federal constitutional rights to privacy, due process, freedom of speech, thought, and religion, as well as equal protection under the law.<sup>128</sup> He also claimed that, under the Maryland Declaration of Rights and the United States Constitution, due process requires a judicial proceeding to determine one's competence before the hospital may forcibly administer antipsychotic drugs.<sup>129</sup>

The circuit court granted the State summary judgment, holding that section 10-708 did not on its face violate Williams' constitutional rights.<sup>130</sup> The court also found that the State's conduct in complying with the statute did not violate any of Williams' specific rights. Williams appealed, and the Court of Appeals granted certiorari before the Court of Special Appeals considered the case.<sup>131</sup>

The Court of Appeals addressed the constitutionality of the statute allowing forcible administration of antipsychotic drugs to an involuntarily committed mental patient in a non-emergency situation.<sup>132</sup> Because Williams was the first person of this class to attack the statute's constitutionality in a Maryland court,<sup>133</sup> the court examined federal law to determine whether individuals involuntarily

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127. MD. HEALTH-GEN. CODE ANN. § 10-708 (c) (1990). Subsection (c) states in relevant part:

(1) In determining whether to approve the medication, the clinical review panel shall:

(i) Review the individual's clinical record;  
(ii) Consult with facility personnel who are responsible for implementing the individual's treatment plan;  
(iii) Consult with the individual regarding the reasons for refusing the medication;

(iv) Review the individual's capacity to make decisions concerning treatment; and

(v) Review the potential consequences of requiring the individual to accept the medication and of withholding the medication from the individual.

(2) The clinical review panel may not approve the medication where there are alternative treatments that are acceptable to both the individual and facility personnel who are directly responsible for implementing the individual's treatment plan.

*Id.*

128. See 319 Md. at 491-92, 573 A.2d at 812.

129. See *id.* at 493, 573 A.2d at 813.

130. *Id.* at 492, 573 A.2d at 812.

131. See *id.*

132. See *id.* at 486, 573 A.2d at 809.

133. This is not to say, however, that Williams was the first patient to assert a right to refuse medication. Approximately 50% of psychiatric outpatients stop taking medication as prescribed, and anywhere from 1% to 15% of committed patients refuse antipsychotic drug treatment. See Blackburn, *supra* note 122, at 458 n.53, 461 n.62.

committed to mental institutions have a constitutional right to refuse treatment and, if so, what limitations federal courts place on this right.<sup>134</sup>

The court held that section 10-708, on its face and as applied in this case, did not afford the required procedural due process protections that the state and federal constitutions guarantee, and it therefore could not be enforced against him.<sup>135</sup> Specifically, the court found that the absence of provisions for advance notice to the patient of the proceedings, and for an opportunity to present evidence and cross-examine witnesses, rendered the statute procedurally unconstitutional under federal law.<sup>136</sup>

## 2. *Legal Context.*—

a. *Right to Refuse in Maryland.*—Under the Maryland case *Sard v. Hardy*,<sup>137</sup> a “physician, treating a mentally competent adult under non-emergency circumstances, cannot properly undertake to perform surgery or administer other therapy without the prior consent of his patient.”<sup>138</sup> Thus, if competent,<sup>139</sup> the patient has the right to exercise control over his own body by deciding whether to submit to certain medical treatment.<sup>140</sup> In enacting section 10-708, the Gen-

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134. See *Williams*, 319 Md. at 495-507, 573 A.2d at 814-20. According to the court, reviewing case law in jurisdictions that have considered the constitutional implications of forcibly medicating involuntarily committed mentally ill patients helps little in determining the constitutionality of the Maryland statutes, because it involves interpreting varying statutes, state constitutions, and common-law rules. See *id.* at 510 n.9, 573 A.2d at 821 n.9.

135. See *id.* at 509-10, 573 A.2d at 820-21.

136. See *id.* (citing *Washington v. Harper*, 110 S. Ct. 1028 (1990)).

137. 281 Md. 432, 379 A.2d at 1014 (1977).

138. *Id.* at 439, 379 A.2d at 1019 (the doctrine of informed consent requires a physician to inform a patient of the illness's nature, the proposed treatment, the contemplated therapy's probability of success and its alternatives, and the risk associated with such treatment).

139. *Williams* was never adjudicated incompetent. The court stated that “[n]othing in § 10-708 requires that the inmate be adjudged incompetent before drugs may be involuntarily administered to him. The fact that the inmate has been involuntarily institutionalized in a psychiatric facility is not tantamount to a finding that he is mentally incompetent to make treatment decisions.” 319 Md. at 508 n.8, 573 A.2d at 820 n.8; cf. *Blackburn*, *supra* note 122, at 472 n.88 (Maryland law has no express provisions that persons committed to state mental institutions are presumed competent unless adjudicated incompetent).

140. See *Sard*, 281 Md. at 439, 379 A.2d at 1019. The doctrine of informed consent imposes on the physician a duty to explain the medical procedure to the patient, and warn her of any material risks inherent in the therapy. This obligation enables the patient to make an informed and intelligent decision about whether to undergo the treatment. A physician may not substitute her judgment for that of the patient in the matter of consent to treatment. See *id.* at 439-40, 379 A.2d at 1020.

eral Assembly altered the common law right to refuse medication, by allowing nonconsensual medication of patients involuntarily committed by court order to a psychiatric facility when a clinical review panel of health care professionals approves the medication.<sup>141</sup>

*b. Formulation of a Constitutional Right to Refuse Medication and Limitations on this Right: Federal Law.—*

(1) *Youngberg v. Romeo*.—In *Youngberg v. Romeo*,<sup>142</sup> the Supreme Court held that a profoundly retarded man who was involuntarily committed to a Pennsylvania State institution had constitutionally protected interests in safe conditions of confinement, freedom from bodily restraint, and minimal training as therapy for his condition.<sup>143</sup> Defining Romeo's substantive rights as "liberty interests" protected under the fourteenth amendment's due process clause,<sup>144</sup> the Court stated that a court must determine whether those rights have been violated by balancing the individual's liberty interests against the state's interests.<sup>145</sup> The proper standard for determining whether a state has adequate procedural safeguards protecting those liberty interests is whether professional medical judgment in fact was exercised; courts must presume that decisions

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141. State laws recognizing the committed person's right to refuse antipsychotic drug treatment are grouped as follows: Twenty-two states recognize the right of all committed persons to refuse treatment; five states recognize the right of voluntary, but not involuntary, patients' right to refuse (Maryland falls in this group); five states expressly deny all committed patients a right to refuse; fourteen states and the District of Columbia do not in any way address a right to refuse antipsychotic drugs. See Blackburn, *supra* note 122, at 466 & 466-67 n.78.

142. 457 U.S. 307 (1982).

143. See *id.* at 324. Nicholas Romeo was a profoundly retarded thirty-three year old man who was committed to a state institution and injured on numerous occasions, both by his own violence and by other residents' reactions to him. *Id.* at 309-10. At times, he was physically restrained by "soft" restraints on his arms. *Id.* at 310 n.4. Romeo's mother brought suit as her son's next friend, claiming that the institution violated his constitutional rights under the eighth and fourteenth amendments. See *id.* at 310.

144. See *id.* at 314-15.

145. See *id.* at 320. Included among the state's interests were the protection of institutionalized individuals and others from violence, and the fiscal and administrative burdens additional procedures would require. See *id.* at 320-21. Maryland law provides individuals in mental health facilities with a statutory right to

[r]eceive appropriate humane treatment and services in a manner that restricts the individual's personal liberty . . . only to the extent necessary . . . ; [to] receive treatment in accordance with the applicable . . . individualized treatment plan . . . ; [and to be] free from restraints . . . [absent an] emergency where the individual presents a danger to the life or safety of the individual or of others.

MD. HEALTH-GEN. CODE ANN. § 10-701(c)(1)-(3) (1990).



by qualified professionals are valid.<sup>146</sup> Such decisions can only be overruled if they are "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."<sup>147</sup>

The *Youngberg* Court's professional-judgment standard is significant because it removes from the judicial process the decision to override a patient's substantive rights. But in making a decision, medical professionals may not disregard the state statutory procedural protections accorded to the patient, and judicial review will occur upon the patient's showing that the facts do not support the medical professional's decision to forcibly medicate her.<sup>148</sup>

(2) *The Rennie, Johnson, and Charters Trilogy*.—Because the institutional care of mentally disabled persons poses problems that in many ways are unlike those associated with the institutional treatment of the mentally ill, it was unclear whether the *Youngberg* decision should control a mentally ill patient's right to refuse antipsychotic medication.<sup>149</sup> The United States Courts of Appeals for the Third and Fourth Circuits addressed this question in *Rennie v. Klein* (*Rennie II*),<sup>150</sup> *Johnson v. Silvers*,<sup>151</sup> and *United States v. Charters*.<sup>152</sup>

In *Rennie II*, an individual who was involuntarily committed to a New Jersey mental facility brought an action charging the defendant officials and employees with violating his constitutional right to refuse antipsychotic drugs.<sup>153</sup> The court held that the drugs "may be constitutionally administered to an involuntarily committed mentally ill patient whenever, in the exercise of professional judgment, such an action is deemed necessary to prevent the patient from endangering himself or others."<sup>154</sup> Thus, although it recognized that

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146. See *Youngberg*, 457 U.S. at 321-23. The Court said that "there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions." *Id.* at 323.

147. *Id.*

148. See *id.* at 322-23.

149. See Note, *A Common Law Remedy for Forcible Medication of the Institutionalized Mentally Ill*, 82 COLUM. L. REV. 1720, 1734 (1982). The main legal distinction between the two groups is that mentally retarded persons are presumed incompetent to make decisions, while mentally ill persons are not presumed incompetent. See *supra* note 139.

150. 720 F.2d 266 (3d Cir. 1983) [*Rennie II*].

151. 742 F.2d 823 (4th Cir. 1984).

152. 863 F.2d 302 (4th Cir. 1988) (en banc), *cert. denied*, 110 S. Ct. 1317 (1990).

153. See 720 F.2d at 267-68.

154. *Id.* at 269.

the mentally ill patient has a substantive constitutional interest to be free from medication, the court accepted the professional-judgment standard as sufficient procedural protection of that interest.<sup>155</sup> Judicial review would be available to protect the patient only from arbitrary administration of drugs.<sup>156</sup>

Similarly, the Fourth Circuit in *Johnson* held that forcible administration of antipsychotic drugs presented a sufficient intrusion upon bodily security to give rise to a constitutionally protectible liberty interest.<sup>157</sup> The court said that the remaining issue, whether the deprivation of that interest was without procedural due process of law, was to be decided under *Youngberg's* professional-judgment test.<sup>158</sup>

Finally, the Fourth Circuit in *Charters* recognized that persons legally confined "retain significant [liberty] interests . . . [that] must yield to the legitimate government interests that are incidental to the basis for legal institutionalization."<sup>159</sup> The court recognized

155. See *id.* at 269-70. But the *Rennie II* court distinguished its professional-judgment standard from that proposed by Chief Judge Seitz in *Youngberg v. Romeo*, and cited with approval by the Supreme Court. See *id.* at 270 n.8; *Youngberg v. Romeo*, 644 F.2d 147, 178 (4th Cir. 1980) (Seitz, C.J., concurring). The *Rennie II* court stated:

The essential difference between the constitutional standard proposed by Chief Judge Seitz and that announced here is that Judge Seitz would leave it to the professional judgment of the medical authorities as to whether antipsychotic drugs could be forcibly administered to involuntarily committed patients even in the absence of a threshold determination that the patient was a danger to himself or others. The standard adopted here would preclude the forcible administration of such drugs unless the predicate determination was made that the patient was a danger either to himself or others.

720 F.2d at 270 n.8.

156. The professional-judgment standard replaced the more demanding "least intrusive means" standard espoused by the court two years earlier in *Rennie v. Klein*, [Rennie I] 653 F.2d 836, 845 (3d Cir. 1981) (en banc). In *Rennie I*, the court said that the involuntarily committed patient's right to refuse antipsychotic drugs may be limited only by the least intrusive infringement that does not exceed "that required by needed care or legitimate administrative concerns." *Id.* Maryland law provides that "[t]he clinical review panel may not approve the medication where there are alternative treatments . . ." MD. HEALTH-GEN. CODE ANN. § 10-708(c)(2) (1990). For § 10-708(c)'s text in its entirety, see *supra* note 127. Because alternative treatments necessarily include "least intrusive" alternatives, there is some uncertainty as to the standard to be applied in Maryland. For a comprehensive discussion of the "least intrusive means" doctrine, see generally Comment, *The Scope of the Involuntarily Committed Mental Patient's Right to Refuse Treatment with Psychotropic Drugs: An Analysis of the Least Restrictive Alternative Doctrine*, 28 VILL. L. REV. 101 (1982).

157. See 742 F.2d 823, 825 (4th Cir. 1984). As was Williams, Johnson was an involuntarily committed patient at Perkins Hospital Center, and claimed that forcible medication with antipsychotic drugs interfered with his thought process. See *id.* at 824.

158. See *id.* at 825.

159. 863 F.2d 302, 305 (4th Cir. 1988) (en banc), cert. denied, 110 S. Ct. 1317 (1990).

valid limitations on the mentally ill individual's substantive liberty interests, and established procedural due process requirements the state must follow to limit those rights, saying that individual interests are "only afforded protection against arbitrary and capricious government action."<sup>160</sup>

These Third and Fourth Circuit decisions establish that forcible administration of antipsychotic drugs to involuntarily committed psychiatric patients implicates a constitutionally protected liberty interest. Both circuits nevertheless applied *Youngberg's* professional-judgment test<sup>161</sup> to find that procedural due process does not require a judicial determination to override the patient's refusal to take the drugs. The Supreme Court ruled on the issue for the first time in *Washington v. Harper*.<sup>162</sup>

(3) *Washington v. Harper*.—*Harper* involved a challenge to a prison policy authorizing forcible treatment with antipsychotic drugs under certain circumstances.<sup>163</sup> According to the policy, the prison could forcibly medicate a prisoner if a psychiatrist determined that the prisoner (1) suffered from a mental disorder and (2) was gravely disabled, or posed a likelihood of serious harm to himself, others, or their property.<sup>164</sup> An inmate who refused medication was entitled to a hearing before a special committee consisting of a psychiatrist, psychologist, and the associate superintendent of the prison's medical center.<sup>165</sup> None of the committee members could be involved in the inmate's treatment or diagnosis at the time of the hearing.<sup>166</sup> The policy also provided the prisoner certain procedural rights, but did not allow for a judicial hearing before for-

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160. *Id.* The court specifically found that procedural due process would be satisfied by placing responsibility in appropriate medical personnel for making base-line medication decisions, with judicial review to guard against arbitrariness. Thus, the court would not require any judicial proceeding to determine the patient's competence and then, if found incompetent, to determine his best interests. *See id.* at 308-09. The court reasoned that if judges were required to make "substituted judgments" for the incompetent patient, they would be "cast in the [improper] role of making the primary decisions on purely medical and psychiatric questions, rather than reviewers of such decisions made by qualified professionals." *Id.* at 309.

161. *See supra* text accompanying notes 146-147.

162. 110 S. Ct. 1028 (1990). The Court initially considered, but did not decide the issue, in *Mills v. Rogers*, 457 U.S. 291 (1982). *See infra* note 180.

163. *See Harper*, 110 S. Ct. at 1032.

164. *Id.* at 1033.

165. *Id.* The committee's composition is similar to that of the clinical review panel provided by the Health-General Article. *See* MD. HEALTH-GEN. CODE ANN. § 10-708(b) (1990); *supra* note 123.

166. 110 S. Ct. at 1033.

cible treatment was authorized.<sup>167</sup> The prisoner bringing the suit claimed that absence of a judicial hearing violated both the federal and state constitutions.<sup>168</sup>

The Supreme Court recognized that under the fourteenth amendment's due process clause, the inmate has a protectible liberty interest in being free from the arbitrary administration of anti-psychotic drugs.<sup>169</sup> Nevertheless, the Court held that the inmate could be medicated over his objections because the state policy comports with both substantive and procedural due process requirements: the policy is reasonably related to the State's legitimate interest in combatting the danger posed by a violent, mentally ill inmate,<sup>170</sup> and the policy's administrative hearing procedures comport with procedural due process.<sup>171</sup>

More important, the Court held that due process did not require a judicial hearing to determine competence before an institution could forcibly administer antipsychotic drugs to involuntarily committed mental patients.<sup>172</sup> This is significant because it carves out a narrow exception to the principle that competent adults may refuse medical treatment.<sup>173</sup> The Court justified this by noting the nature of the prison environment, which "is made up of persons with 'a demonstrated proclivity for antisocial criminal, and often violent, conduct' "<sup>174</sup> and which in some instances necessitates forcible medication. Thus, *Harper* clarified that the *Youngberg* professional-judgment standard would dictate procedural due process protections of mentally ill patients' rights.

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167. *Id.* at 1033-34. The procedural rights provide that the inmate be given at least 24 hours notice of the hearing; that he receive notice of the tentative diagnosis, its factual basis, and the reason the staff believes medication is necessary; that he has a right to attend the hearing, present evidence and witnesses, cross-examine staff witnesses, and have the assistance of a lay advisor who understands the psychiatric issues involved; that minutes of the hearing be kept and a copy provided to the inmate; that he has the right to appeal the committee's decision to the Superintendent of the prison's medical center; and that he has the right to seek judicial review of the decision in state court. *Id.*

168. *See id.* at 1034.

169. *See id.* at 1036.

170. *See id.* at 1038-39.

171. *See id.* at 1044 (mandating notice and the specified hearing rights "satisfies the requirement that the opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' " (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

172. *See id.* at 1040. If a judicial determination of incompetency is unnecessary, then the question of Williams' competence is irrelevant. *See supra* note 139 and accompanying text.

173. *See supra* notes 138-140 and accompanying text.

174. *Harper*, 110 S. Ct. at 1038 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)).

3. *Analysis*.—The Maryland Court of Appeals recognized, as did the Supreme Court in *Harper*, that mentally ill patients have a protectible liberty interest in being free from forcible arbitrary medication.<sup>175</sup> Thus, the court interpreted the legislature's intent as creating a

justifiable expectation that the drugs will not be administered to an inmate unless he is mentally ill and a danger to himself or others. . . . The extent of Williams's constitutional right to refuse drugs prescribed for this purpose must be determined in the context of his confinement, as stated in *Harper*. . . . Thus, unwanted drugs could in no event be administered to a mentally ill inmate involuntarily admitted to a state psychiatric facility, absent compliance with the strict legislative formulation of § 10-708.<sup>176</sup>

The court concluded that in section 10-708 the legislature implicitly recognizes a protectible interest because the statute carves out only a very narrow exception to the common-law rule that a patient must consent to treatment. The deficiency in the court's opinion is its neglect to give an express ruling on whether the Maryland constitution and the federal constitution recognize the same substantive and procedural rights. Absent such a holding, the legislature can only assume that the court will not require procedural protections beyond those required in *Harper*.<sup>177</sup> This is reasonable given the court's reliance on federal law in *Williams*.<sup>178</sup>

Using federal law to determine the procedural minimum the legislature must provide to protect the patient's interest, the court implied that Maryland's constitution recognizes the same substan-

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175. See *Williams*, 319 Md. at 509-10, 573 A.2d at 821. The court stated that "[s]ection 10-708, like the administrative policy approved in *Harper*, implicitly recognizes that the involuntarily committed inmate has a significant constitutional liberty interest to be free from the arbitrary administration of antipsychotic drugs." *Id.* at 508, 573 A.2d at 820 (emphasis in original). See also *Harper*, 110 S. Ct. at 1036.

176. 319 Md. at 508-09, 573 A.2d at 820 (footnotes omitted). Regardless of whether the legislature intends to re-enact section 10-708 to comport with the *Williams* decision, the fact that it statutorily recognized a right to refuse medication, then denied that right to a particular group of individuals, evidences its strong support of the state's interests in this area. If the legislature does re-enact section 10-708, *Williams* clarifies that *Harper*'s procedural protections will have to be included. The question remains, however, whether these protections will be sufficient to make the statute constitutional, or whether the Maryland legislature must include additional requirements.

177. The court not only cited federal law, but the legislature also constructed section 10-708 in accordance with the federal "medical model" of limiting a committed person's right to refuse medication. See Blackburn, *supra* note 122, at 479, n.101.

178. See 319 Md. at 495-507, 573 A.2d at 814-20.

tive and procedural interests as does the federal constitution.<sup>179</sup> This is significant because if Maryland law recognizes broader liberty interests than those recognized by the federal constitution, then "the broader state protections would define the actual procedural rights and duties of persons within the State."<sup>180</sup> Thus, amending section 10-708 to include *Harper's* procedural due process protections may not suffice to make the statute valid under the Maryland constitution.

Although the court cited federal cases as authority and it did not expressly declare that Maryland recognizes broader liberty interests than those recognized by the federal constitution, it clouded the issue by citing the Maryland Code provisions concerning the rights of mentally ill individuals.<sup>181</sup> Perhaps the court wanted to emphasize the importance it places on the liberty interests of mentally ill individuals, and the fact that certain fundamental rights may not be abridged unless absolutely necessary. By "reminding" the legislature of the statutes that give mentally ill persons the opportunity to participate in developing their own treatment plans, the court might simply be signalling the legislature that section 10-708 would be constitutional if the legislature adopts *Harper's* procedural protections.

The court compared *Harper's* Supreme Court-approved procedural due process protections<sup>182</sup> with section 10-708's require-

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179. The State asserted that the Maryland Declaration of Rights and the United States Constitution are to be construed as a single document and, therefore, that they have the same meaning. See Brief for Appellee at 15-16, *Williams* (No. 88-140). Case law establishes that the "rights guaranteed by these Articles of the Declaration of Rights and the Fourteenth Amendment are the same. . . . In construing these Articles the Maryland court has held that the decisions of the Supreme Court are practically direct authorities." *Sanner v. Trustees of Sheppard & Enoch Pratt Hosp.*, 278 F. Supp. 138, 141-42 (D. Md.) (citing *City of Frostburg v. Jenkins*, 215 Md. 9, 136 A.2d 852 (1957)), *aff'd*, 398 F.2d 226 (1968) (per curiam), *cert. denied*, 393 U.S. 982 (1968); *Home Utilities Co. v. Revere Copper & Brass, Inc.*, 209 Md. 610, 122 A.2d 109 (1955); *Goldsmith v. Mead Johnson & Co.*, 176 Md. 682, 7 A.2d 176 (1939).

180. *Mills v. Rogers*, 457 U.S. 291, 300 (1982). In *Mills*, voluntary and involuntary mental patients at a Massachusetts state institution brought a class action alleging that their federal constitutional rights were violated by forcible administration of anti-psychotic drugs. See *id.* at 293-94. The Supreme Court remanded the case to the First Circuit Court of Appeals to consider whether correct disposition of the case was affected by the Massachusetts Supreme Judicial Court's intervening decision involving such rights, under both Massachusetts common law and the federal constitution. See *id.* at 303.

181. See 319 Md. at 486-88, 573 A.2d at 809-10 (citing MD. HEALTH-GEN. CODE ANN. §§ 10-701(c), (f), -702, -703, -706 (1990)); see also *supra* note 145.

182. See *supra* note 167.

ments,<sup>183</sup> and found that on its face, section 10-708 did not provide procedural due process protections to which Williams was entitled.<sup>184</sup> Thus, without considering Williams' other claims, the court invalidated the statute solely on the procedural due process grounds, and declared that *Sard v. Hardy's* common-law principles<sup>185</sup> were controlling.<sup>186</sup> By invalidating the statute on narrow grounds, stating simply that section 10-708, "in its present form, cannot be enforced against Williams,"<sup>187</sup> the court implied that the statute could be enforced if it contained *Harper's* procedures.

Assuming that federal law is the proper authority for determining the rights of involuntarily committed mental patients in Maryland, the federal law's scope remains to be determined. There are many issues that federal courts have not addressed in assessing the constitutionality of forcible medication statutes. In particular, they have avoided the more difficult first amendment and equal protection claims by labeling them general "liberty interests,"<sup>188</sup> and analyzing them under the due process clause.

The nature of the procedural protection, however, varies with the right to be protected. The procedural protection due must be determined in light of a particular case's facts and the "degree of potential deprivation that may be created by a particular decision,"<sup>189</sup> which necessarily hinges on the scope of the constitutional right infringed upon. Absent federal delineation of the nature and scope of this vague "protectible liberty interest," the *Williams* court did not attempt to define the constitutional right.<sup>190</sup> In particular,

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183. See *supra* note 127.

184. See 319 Md. at 509, 573 A.2d at 820-21.

185. 281 Md. 432, 379 A.2d 1014 (1977); see *supra* notes 137-140 and accompanying text.

186. See 319 Md. at 510, 573 A.2d at 821.

187. *Id.* (emphasis added).

188. See, e.g., *Washington v. Harper*, 110 S. Ct. 1028, 1034-36 (1990) (prisoner claimed violation of due process, equal protection, and free speech clauses and the Court, not considering each claim separately, referred to them as "significant liberty interests" protected under the fourteenth amendment's due process clause); cf. *Mills v. Rogers*, 457 U.S. 291, 294 n.3 (1982) (noting that the district court's characterization of such "liberty interests" as "the power to produce ideas" embodied first amendment concerns).

189. *Mathews v. Eldridge*, 424 U.S. 319, 341 (1976) (the essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and the opportunity to defend; due process is a flexible concept and calls for such procedural protections as the situation demands).

190. The court's analysis in *Williams* consisted of summaries of several federal cases with the conclusion that due process was not satisfied in light of one of the decisions. See 391 Md. 485, 495-510, 573 A.2d 809, 813-21 (1990).

the court did not address Williams' specific challenges that the statute violated his first amendment right to freedom of religion and his right to equal protection under the law.

Williams argued that antipsychotic drug treatment disrupted his thought processes to such an extent that he could not recite the daily prayers required by his religion,<sup>191</sup> and this denied his first amendment right to freedom of religion. Because the court invalidated on due process grounds the forcible medication statute, it did not address this claim, and left unclear whether the State's interests in forcible medication would override such a claim.<sup>192</sup>

Nor did the court address Williams' claim that the statute violated state and federal constitutional equal protection guarantees by discriminating between involuntary psychiatric patients and all other patients needing psychiatric or other medical treatment.<sup>193</sup> Williams argued that section 10-708 discriminates against involuntarily committed mental patients because it does not allow them an adjudication of incompetence, and appointment of a guardian, prior to the medication's forcible administration.<sup>194</sup> Absent a finding of incompetence, Williams argued that the common-law principle controls—no competent person may be forcibly medicated in non-emergency situations.<sup>195</sup> The equal protection argument's force is lessened by the Supreme Court's finding in *Harper*, that a judicial determination of incompetence is unnecessary, given a state's legitimate interest in reducing the danger that a mentally ill person poses.<sup>196</sup> But *Harper* does not fully justify the discriminatory effect of Maryland's statute, especially considering that every other Maryland citizen has the common-law right to medical self-determination.

4. *Conclusion.*—The court's holding in *Williams* restored the common law as controlling a mentally ill patient's right to refuse medical treatment, and removed any discrimination among different classes of mental patients. Although it invalidated the forcible medication statute, the court assessed only its procedural deficiencies without indicating which of Williams' substantive rights it was pro-

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191. See *id.* at 490, 573 A.2d at 811.

192. The court stated that section 10-708 was unconstitutional "on [the procedural due process] ground alone, without consideration of Williams's other claims . . ." 319 Md. at 510, 573 A.2d at 821.

193. See Brief for Appellant at 26-32.

194. See *id.* at 27.

195. See *id.*; see *Sard v. Hardy*, 281 Md. 432, 439, 379 A.2d 1014, 1019 (1977).

196. See *Washington v. Harper*, 110 S. Ct. 1028, 1039 (1990).



tecting. Thus, the legislature can reasonably assume that procedural amendment of the statute will make it constitutionally valid. Nevertheless, because the court disposed of the statute on this issue alone, procedural changes may be insufficient to correct any substantive defects in the statute. Until the federal courts clearly define the nature and scope of the right to refuse forced medication, involuntarily committed mental patients in Maryland will benefit from the court's reluctance to restrict their right to refuse treatment.

### C. *Right to a Speedy Trial*

In *State v. Bailey*,<sup>197</sup> the Court of Appeals held that a two year and nine day delay between arrest and trial did not violate the defendant's sixth amendment right to a speedy trial,<sup>198</sup> or his fourteenth amendment right to due process of law.<sup>199</sup> To evaluate the speedy trial claim, the court applied the balancing test established in the 1972 Supreme Court case, *Barker v. Wingo*.<sup>200</sup> The balancing test requires weighing four factors: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant.<sup>201</sup> The Court of Appeals assumed that the length of delay was the entire two year and nine day period between the defendant's arrest and his trial, and thus found it unnecessary to address whether the State's entry of a nolle prosequi stopped the speedy-trial clock.<sup>202</sup> The court concluded that Bailey's right to a speedy trial was not violated be-

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197. 319 Md. 392, 572 A.2d 544 (1990). Judge Orth wrote the court's opinion, joined by Chief Judge Murphy and Judge Eldridge. Judge McAuliffe wrote a concurring opinion, joined by Judge Rodowsky. See *id.* at 421, 572 A.2d at 558. Judge Cole dissented, joined by Judge Adkins. See *id.* at 424, 572 A.2d at 559.

198. *Id.* at 420-21, 572 A.2d at 557. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . ."). See also *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967) (the sixth amendment right to a speedy trial is "fundamental" and applies to the states because it is incorporated under the fourteenth amendment's due process clause).

199. See U.S. CONST. amend. XIV, § 1. The fourteenth amendment provides that "[n]o State shall . . . deprive any person of . . . liberty . . . without due process of law . . . ." *Id.*

200. 407 U.S. 514 (1972).

201. See *id.* at 530-32.

202. See 319 Md. at 410, 572 A.2d at 552. A nolle prosequi is a decision not to prosecute. The short-hand term for an entry of nolle prosequi is "nol pros." See BLACK'S LAW DICTIONARY 945 (5th ed. 1979). The Maryland Rules provide for disposition of charges by a nolle prosequi as follows:

The State's Attorney may terminate a prosecution on a charge and dismiss the charge by entering a nolle prosequi on the record in open court. A statement of the reasons for entering a nolle prosequi shall be made a part of the record. . . .

cause, on balance, the case's circumstances outweighed any actual prejudice to Bailey.<sup>203</sup> The court rejected Bailey's due process claim because he failed to demonstrate that the delay caused him unfair prejudice.<sup>204</sup> In *Bailey*, the court discussed in detail only the actual prejudice prong of the *Barker* test.<sup>205</sup> The analysis thus focused to a greater extent than have previous cases on the single factor of actual prejudice.<sup>206</sup>

1. *The Case.*—On February 14, 1986, Alex Ray Bailey was arrested and charged with several violations of the Controlled Dangerous Substances Act.<sup>207</sup> Five weeks later, a grand jury indicted him on charges of cocaine distribution, possession with intent to distribute cocaine, and conspiracy to distribute cocaine. On June 6, 1986, the State dismissed the charges by entering a nolle prosequi.<sup>208</sup> The State initiated the nol pros after it became aware that one and one-half years earlier, Bailey was tried, convicted, and sentenced in absentia in South Carolina for drug-related offenses.<sup>209</sup> The defense counsel objected to the entry of a nolle prosequi, and reiterated Bailey's demand for a speedy trial.<sup>210</sup>

On May 28, 1987, nearly one year after the State entered a nolle prosequi, Bailey was reindicted for cocaine possession, and in-

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... When a nolle prosequi has been entered on a charge, any conditions of pretrial release on that charge are terminated, any bail bond posted for the defendant on that charge shall be released. The clerk shall take the action necessary to recall or revoke any outstanding warrant or detainer that could lead to the arrest or detention of the defendant because of that charge.

Md. R. 4-247.

The Court of Special Appeals viewed the determinative issue in this case as whether the nol pros was legitimate, so as to stop the clock until new charges were filed, or illegitimate, so that the speedy-trial clock was not tolled. See *Bailey v. State*, No. 88-737, slip op. at 2 (Md. Ct. Spec. App. Apr. 17, 1989) (per curiam), *rev'd*, 319 Md. 392, 572 A.2d 544 (1990). The Court of Appeals held that even if the speedy trial clock ran from the original charges, Bailey's right to a speedy trial was not violated. See 319 Md. at 420, 572 A.2d at 557.

203. See 319 Md. at 419, 572 A.2d at 557.

204. See *id.* at 420-21, 572 A.2d at 557.

205. See *id.* at 412-19, 572 A.2d at 553-57.

206. See *infra* notes 266-273 and accompanying text.

207. *Bailey*, 319 Md. at 397, 572 A.2d at 546; MD. ANN. CODE art. 27, § 286A (1957).

208. 319 Md. at 397, 572 A.2d at 546. The State's reasons for the nol pros were to allow it to develop a charge of cocaine importation against Bailey, to allow South Carolina "to enroll" the conviction in absentia so that Maryland could sentence Bailey as a recidivist, and to allow Bailey to begin serving his South Carolina sentence. See *id.* at 402-03, 572 A.2d at 549.

209. See *id.* at 399, 572 A.2d at 547.

210. See *id.* at 401, 572 A.2d at 548.

dicted for the first time for importing cocaine into Maryland.<sup>211</sup> During the interval between dismissal of the original charges and the filing of new charges, Bailey was held in South Carolina pursuant to his ten year sentence in that state.<sup>212</sup>

Bailey was brought to trial approximately nine months after the new charges were issued.<sup>213</sup> For seven months of this period, he remained incarcerated in South Carolina and fought extradition to Maryland.<sup>214</sup> After he was returned to Maryland, the court postponed the original trial date because of conflicts with the defense counsel's schedule.<sup>215</sup> Six days before trial, Bailey moved to dismiss for "lack of a speedy trial."<sup>216</sup> The Circuit Court for Montgomery County denied the motion and the trial proceeded. A jury found Bailey guilty of possession of cocaine with intent to distribute, and not guilty of bringing cocaine into the State.<sup>217</sup>

To summarize, the time between Bailey's original arrest and his trial can be divided into three intervals: (1) from his arrest on February 14, 1986 until the indictment was nol prossed on June 6, 1986 (approximately four months); (2) from June 6, 1986 until May 28, 1987 when Bailey was reindicted for possession of cocaine and indicted for the first time for importing cocaine into Maryland (approximately one year); and (3) from May 28, 1987 until February 19, 1988 when Bailey's motion to dismiss was heard and denied six days before trial (approximately nine months).<sup>218</sup>

Bailey appealed his conviction on the grounds that the State's delay in bringing him to trial violated his sixth amendment right to a speedy trial and alternatively, that it denied him due process of law.<sup>219</sup> The Court of Special Appeals reversed Bailey's conviction,

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211. *Id.* at 397-98, 572 A.2d at 546.

212. *Id.* at 401-02, 572 A.2d at 548. After the State's Attorney's Office nol prossed the original Maryland indictment, Bailey was returned to South Carolina pursuant to a request it filed in accordance with the Interstate Agreement on Detainers. *See* MD. ANN. CODE art. 27, §§ 616A-616R (1987 & 1989 Supp.).

213. *See* 319 Md. at 397-98, 572 A.2d 546.

214. On July 1, 1987, about four weeks after the reindictment, Maryland requested Bailey's return pursuant to the Interstate Agreement on Detainers. *See id.* at 402, 572 A.2d at 548. Because Bailey resisted the extradition, South Carolina did not approve the transfer until November 3, 1987, and Bailey did not arrive in Maryland until November 25, 1987. *See id.*

215. *See id.*

216. *Id.* at 398, 572 A.2d at 546.

217. *Id.*

218. *See* Bailey v. State, No. 88-737, slip op. at 1-2 (Md. Ct. Spec. App. Apr. 17, 1989) (per curiam), *rev'd*, 319 Md. 392, 572 A.2d 544 (1990). The court set out a "chronology" of events in the opinion. *See* 319 Md. at 398-402, 572 A.2d at 546-48.

219. *See* No. 88-737, slip op. at 1.

holding that his right to a speedy trial was violated. It did not reach the due process claim.<sup>220</sup> The court viewed the dispositive issue to be whether the nolle prosequi was a legitimate termination of the case so as to toll the speedy trial clock.<sup>221</sup> It reasoned that a legitimate nolle prosequi<sup>222</sup> would have stopped the speedy-trial clock so that the delay would be limited to the nine month period from re-indictment to trial, which was largely attributable to the defendant.<sup>223</sup> If, however, the nol pros was not legitimate and did not stop the clock, the resulting two year and nine day delay was “presumptively prejudicial” and was largely attributable to the State. Because the State nol prossed the charges for purposes of tactical delay and not to build a prima facie case, the Court of Special Appeals concluded that the nolle prosequi did not stop the speedy trial clock, and the resulting delay violated Bailey’s right to a speedy trial.<sup>224</sup>

The State petitioned the Court of Appeals to issue a writ of certiorari, and Bailey filed a conditional cross-petition. The court granted both petitions.<sup>225</sup> The questions presented for review were: (1) whether the Court of Special Appeals, for purposes of Bailey’s speedy trial claim, erred in concluding that the delay should be measured from the original indictment, and not from the time new charges were filed; and (2) if the nol pros did not toll the speedy trial clock, was Bailey denied his right to a speedy trial?<sup>226</sup>

2. *Legal Background.*—In *Barker v. Wingo*, the Supreme Court identified four factors to consider in light of the case’s circum-

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220. *See id.*

221. *See id.* at 2. The Court of Special Appeals noted that the State entered the nol pros to gain two tactical advantages—the benefit of enhanced sentencing, and additional charges. The court said that the State could delay a trial for those reasons but that if it did,

it must pay a calculated price. The price is that such delay will count against the State in a speedy trial analysis. If a short delay will gain a significant advantage, it may well be worth the State’s gamble. A lengthy delay for tactical advantage, however, will frequently be fatal to the State’s case. When the State is getting little or nothing in return, it is quite obviously a bad gamble.

*Id.* at 4.

222. Legitimate reasons to enter a nol pros include situations in which the State lacks evidence or probable cause to continue the prosecution. *See Ward v. State*, 30 Md. App. 113, 130, 351 A.2d 452, 461 (1976) (a delay was not within the purview of a speedy trial analysis if the State dismissed the charges because of a lack of probable cause); *Brady v. State*, 36 Md. App. 283, 290, 374 A.2d 613, 618 (1977) (the State could nol pros charges if it had insufficient evidence to support a conviction).

223. *See No. 88-737*, slip op. at 2.

224. *See id.* at 7-8.

225. *Bailey*, 319 Md. at 397, 572 A.2d at 546.

226. *Id.* at 408, 572 A.2d at 551.

stances, to determine whether a defendant's constitutional right to a speedy trial was violated.<sup>227</sup> The factors are: (1) the length of the delay; (2) the reason(s) for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant.<sup>228</sup> The Court explained that the relative importance of each factor depended on each case's particular circumstances:

We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.<sup>229</sup>

As in any balancing test, there is a considerable subjective element in interpreting each case's circumstances. Additionally, decisions on speedy trial claims are complicated by this constitutional protection's "amorphous" nature.<sup>230</sup> The right to a speedy trial differs from other constitutionally guaranteed individual rights because it was created to protect both society and an accused<sup>231</sup>—parties who may have contrary interests. For example, the state's failure to bring a defendant promptly to trial may benefit the defendant, who often will prefer to delay trial.<sup>232</sup>

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227. See 407 U.S. 514, 530-32 (1972). In *Barker*, the Court used a four-pronged balancing test, and held that the "extraordinary" delay of more than five years between the defendant's arrest and trial did not deny his constitutional right to a speedy trial. *Id.* at 530-33. After ten months of incarceration, Barker was released on bail. The prosecution continued the trial 16 times; the bulk of these delays were for the purpose of trying Barker's accomplice in the hope of obtaining a conviction and testimony necessary to convict Barker. *Id.* at 516-17. It took six trials before Barker's accomplice was convicted. *Id.* at 535 n.39. Subsequent delays were attributed to a key prosecution witness's illness. Barker raised his first objection to the continuances approximately three and one half years after his arrest. *Id.* at 517-18. The Court reasoned that the delay's length was "extraordinary" and weighed heavily against the state. See *id.* at 533-34. The Court held that this was a "close" case, but the fact that "Barker did not want a speedy trial" outweighed the deficiencies in bringing him to trial. See *id.* In adopting the balancing test, the *Barker* court rejected "two inflexible approaches" advocated as means to reduce uncertainty and subjectivity from the evaluation of speedy trial claims. See *id.* at 529-30. It refused to establish specific, permissible time periods, and it rejected the rule that a defendant who fails to demand a speedy trial forever waives his right. See *id.* at 522-30.

228. See *id.* at 530-32.

229. *Id.* at 533.

230. See Note, *Criminal Procedure—United States v. MacDonald: Continued Uncertainty in the Right to a Speedy Trial*, 61 N.C.L. REV. 563 (1983).

231. See Survey, *Speedy Trial*, District of Columbia Court of Appeals Project on Criminal Procedure, 27 How. L.J. 805, 805 (1984) (citing *Barker*, 407 U.S. at 519).

232. See *Barker*, 407 U.S. at 519, 521 (delays allowed defendants a greater opportunity

Speedy trial claims are also difficult to assert because, if the court upholds the defendant's claim, the only available sanction is dismissal, and this may require freeing a guilty defendant.<sup>233</sup> Courts understandably are reluctant to reach this result in the absence of clearly intentional State misconduct.<sup>234</sup>

a. *Length of the Delay.*—In speedy trial claims, the length of delay acts as a triggering mechanism: "until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."<sup>235</sup> In *Barker*, the Supreme Court refused to define a specific period after which the constitutional right is violated.<sup>236</sup> Rather, the Court indicated that the specific crime's nature should be used to evaluate whether a delay of a particular duration is tolerable.<sup>237</sup>

Applying *Barker*, the Court of Appeals in *Epps v. State*<sup>238</sup> held that a one year and fourteen day delay between arrest and trial was "presumptively prejudicial" so as to trigger the balancing test.<sup>239</sup> In subsequent cases, this duration has been used as a benchmark such that a delay greater than one year and fourteen days automatically invokes the balancing process.<sup>240</sup>

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to plea bargain and "otherwise manipulate the system," and to increase the likelihood that witnesses would be unavailable or have forgotten their testimony).

233. See *id.* at 522; see also *Strunk v. United States*, 412 U.S. 434 (1973) ("the only possible remedy" for a violation of the sixth amendment right to a speedy trial was to set aside the conviction and to dismiss the charges).

234. Examples of misconduct include delaying a trial until an alibi witness died, or to avoid a specific judge. See *Bailey*, 319 Md. at 403-04, 572 A.2d at 549.

235. *Barker*, 407 U.S. at 530.

236. See *id.* at 523. The Supreme Court found no constitutional basis for authorizing courts to prescribe time periods to define the constitutional right to a speedy trial. Rather, the Court left it to the legislatures defining procedural rules to establish time limits within which trials must be held. See *id.*; see, e.g., Federal Speedy Trial Act of 1974, 18 U.S.C. § 3161 (1988) (the prosecution must file within thirty days of arrest a criminal information or indictment; arraignment must be filed within ten days after the information or indictment was filed; and the final trial must be held within one hundred days of the initial arrest); MD. ANN. CODE art. 27, § 591 (1987) (prescribing specific periods for various stages in an accused's prosecution); R. GILBERT & C. MOYLAN, MARYLAND CRIMINAL LAW: PRACTICE AND PROCEDURE, § 42.10 (1983 & Supp. 1988); MD. R. 4-271.

237. See *Barker*, 407 U.S. at 530-31. For example, the more complicated the case, the greater the time permitted to the state; therefore, a delay is more easily tolerated. See *id.* at 531.

238. 276 Md. 96, 345 A.2d 62 (1975).

239. See *id.* at 111, 345 A.2d at 72.

240. See, e.g., *Jones v. State*, 279 Md. 1, 6, 367 A.2d 1, 5 (1976); *Smith v. State*, 276 Md. 521, 528, 350 A.2d 628, 633 (1976); *Reed v. State*, 78 Md. App. 522, 532, 554 A.2d 420, 428 (1989).

*b. Reason for the Delay.*—The Supreme Court indicated that the reason assigned to each period of a delay is an important factor that courts should assess in the speedy trial inquiry:

A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason such as a missing witness, should serve to justify appropriate delay.<sup>241</sup>

The Court of Appeals has established a similar analysis whereby a delay is first attributed to the State or the defendant, and then weighed against that party according to the delay's underlying motivation or cause,<sup>242</sup> and if the State caused it, whether the delay was deliberate, negligent, or justifiable.<sup>243</sup> A delay accrued continuously rather than in a piecemeal fashion will be weighed more heavily.<sup>244</sup>

*c. Defendant's Assertion of the Right.*—The severity of a deprivation of the right to a speedy trial is directly linked to a defendant's assertion of the right, because "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."<sup>245</sup> Although the defendant's failure to assert the right does not waive it entirely, its assertion is important evidence of deprivation.<sup>246</sup>

In Maryland, a defendant's assertion of the right to a speedy trial is usually given substantial evidentiary weight. For example, in *Jones v. State*,<sup>247</sup> the defendant repeatedly demanded a speedy trial.<sup>248</sup> The State, however, argued that Jones' "numerous changes of counsel" were intentional delays that showed he did not really

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241. *Barker*, 407 U.S. at 531.

242. See *Jones*, 279 Md. at 6-7, 367 A.2d at 5-6; *Smith*, 276 Md. at 528, 350 A.2d at 633.

243. See *Erbe v. State*, 276 Md. 541, 549-50, 350 A.2d 640, 645 (1976). A deliberate delay would be weighted more heavily against the responsible party; inadvertent or negligent delay would be weighted less heavily; and a justifiable delay would not prejudice the responsible party at all. See *id.*

244. See *Jones*, 279 Md. at 7, 367 A.2d at 6.

245. *Barker*, 407 U.S. at 532.

246. See *id.* at 531-32.

247. 279 Md. 1, 367 A.2d 1 (1976).

248. See *id.* at 14-15, 367 A.2d at 10.

want a speedy trial.<sup>249</sup> The court rejected this argument, and gave Jones' assertions of his right full evidentiary weight.<sup>250</sup>

*d. Prejudice to the Defendant.*—A court must assess actual prejudice to the defendant in light of the interests that the speedy trial right was intended to protect.<sup>251</sup> The Court in *Barker* identified three main interests: (1) prevention of oppressive pretrial incarceration; (2) minimization of the defendant's anxiety and concern; and (3) minimization of defense impairment.<sup>252</sup> Of these interests, the Court noted that impairment of the defense should be weighted most heavily because it would "skew[] the fairness of the entire system."<sup>253</sup> The defendant generally has the burden of showing actual prejudice.<sup>254</sup> Commentators have noted, however, that the party with that burden rarely prevails because it is so difficult to establish actual prejudice.<sup>255</sup>

### 3. Analysis.—

*a. Applying the Balancing Test in Bailey.*—The Court of Appeals held that a two year and nine day delay between Bailey's arrest and trial did not violate his constitutional right to a speedy trial.<sup>256</sup> The majority assessed actual prejudice to Bailey in light of the three interests protected by the right.<sup>257</sup> Bailey was imprisoned in Maryland for only four months from the time of his arrest until his return to South Carolina.<sup>258</sup> He remained incarcerated in South Carolina, on unrelated charges, until he was returned to Maryland approximately three months before trial.<sup>259</sup> Because Bailey's South Carolina incarceration was not attributable to Maryland, and because the delay after his return to Maryland was largely attributed to Bailey, the court

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249. See *id.* at 15, 367 A.2d at 10.

250. See *id.* at 16, 367 A.2d at 11.

251. See *Barker*, 407 U.S. at 532.

252. See *id.*

253. *Id.*

254. See Recent Case, *Constitutional Law—Right to Speedy Trial*, 26 VAND. L. REV. 171, 173 (1973).

255. See Survey, *Right to a Speedy Trial, The Supreme Court, 1971 Term*, 86 HARV. L. REV. 164 (1972). The *Barker* court recognized that it is extraordinarily difficult to prove or disprove that a witness's memory has faded, and that the fading has significantly affected the case's outcome. See *Barker*, 407 U.S. at 532.

256. See *Bailey*, 319 Md. at 420-21, 572 A.2d at 557.

257. See *id.* at 416-19, 572 A.2d at 555-57. The concurring opinion agreed with the result on the grounds that the *nol pros* was proper, and hence the delay attributable to the state did not implicate the sixth amendment. See *id.* at 421, 572 A.2d at 558.

258. *Id.* at 416, 572 A.2d at 555.

259. *Id.* at 417, 572 A.2d at 555.



found minimal the total pre-trial incarceration attributable to the State of Maryland.<sup>260</sup>

The court rejected Bailey's claims that he suffered actual prejudice as a result of impairment of his defense and living with anxiety and concern.<sup>261</sup> It stated that Bailey's claims to the contrary were "bald" statements, unsupported by evidence, and without merit,<sup>262</sup> and concluded that any presumed or actual prejudice from the delay was outweighed by the case's particular circumstances.<sup>263</sup>

The court's statement in its holding, that the circumstances "outweigh . . . any prejudice,"<sup>264</sup> suggests that the majority put considerable weight on the absence of substantial actual prejudice. The court did not discuss the other three balancing factors in any detail,<sup>265</sup> and their relative contribution to the court's analysis is unclear.

The court's reliance solely on a finding of no substantial prejudice was a departure from cases in which it specifically stated that all factors must be considered. In *Brady v. State*,<sup>266</sup> (*Brady I*) the court stated: "after there has been a constitutionally significant delay, no one circumstance is controlling in deciding whether the defendant has been denied a speedy trial but . . . all pertinent factors must be considered."<sup>267</sup> In *Brady I*, the Court of Appeals reversed the Court of Special Appeals, which upheld the defendant's conviction because there was no showing of actual prejudice resulting from a fourteen month delay.<sup>268</sup> On remand, the Court of Special Appeals purported to balance the factors, and again upheld the conviction on the finding that no actual or presumed prejudice existed.<sup>269</sup> In *Brady v. State*,<sup>270</sup> (*Brady II*) the Court of Appeals attempted to "settle the role of prejudice in speedy trial cases and to emphasize the role to be played by the other factors courts have stressed as important in the balancing process."<sup>271</sup> The court held that lack of actual prejudice was not dispositive, and after considering each factor, held

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260. See *id.* at 416-17, 572 A.2d at 555-56.

261. See *id.* at 417-19, 572 A.2d at 556-57.

262. See *id.* at 417, 572 A.2d at 556.

263. See *id.* at 419, 572 A.2d at 557.

264. *Id.*

265. See *id.* at 409-12, 572 A.2d at 552-53.

266. 288 Md. 61, 415 A.2d 1126 (1980).

267. *Id.* at 66, 415 A.2d at 1128-29.

268. See *id.* at 62, 415 A.2d at 1126-27.

269. See *Brady v. State*, 46 Md. App. 518, 521, 419 A.2d 390, 391 (1980).

270. 291 Md. 261, 434 A.2d 574 (1981).

271. *Id.* at 263, 434 A.2d at 575.

that the State violated the defendant's right to a speedy trial.<sup>272</sup> Thus, Maryland precedents "leave no room for the single factor approach."<sup>273</sup>

Although *Bailey* purported to follow the balancing test,<sup>274</sup> it is difficult to read the majority opinion as strictly adhering to a multi-factor approach. The bulk of the court's analysis was devoted to examining the three interests that are the basis of evaluating actual prejudice.<sup>275</sup> The court declared that "the peculiar circumstances of this case, considered in the light of the factors to be assessed, were sufficient to outweigh, in the balance, any prejudice, actual and presumed, arising from the length of the delay."<sup>276</sup> Although the majority purportedly balanced all four factors, the absence of express consideration of the other factors, in contrast with the opinion's full discussion of actual prejudice, indicates an emphasis on actual prejudice that departs from the court's previous applications of the balancing test.

Because the right to a speedy trial is by nature so amorphous, and determining speedy trial questions is so imprecise, the results of these cases are necessarily fact specific. For that reason, *Bailey*'s apparent emphasis on actual prejudice probably will not substantially influence future cases. The approach in *Bailey* should be narrowly interpreted to apply to its particular facts.

*b. The Nolle Prosequi.*—The *Bailey* majority avoided deciding what effect a nol pros has on the speedy-trial clock.<sup>277</sup> The Supreme Court has indicated that the prosecution's dismissal of an indictment permanently tolls the speedy-trial clock's running as to that indictment, provided the prosecution acted in good faith.<sup>278</sup> The

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272. See *id.* at 269, 434 A.2d at 578.

273. *Brady I*, 288 Md. at 67, 415 A.2d at 1129.

274. As the court observed in its opinion:

Common to all speedy trial cases decided by the Supreme Court and this Court is the recognition . . . that the balancing test adopted by the Supreme Court is difficult to apply, no one factor being dispositive. All the cases emphasize that in the determination of the speedy trial question, each case rests on its own facts. The determination must be made upon an overall view of the circumstances peculiar to each particular case. . . . [N]o one circumstance, such as the lack of actual prejudice, is controlling in deciding whether the defendant has been denied a speedy trial. All pertinent factors, including the presumption of prejudice, must be considered.

319 Md. at 414-15, 572 A.2d at 554-55.

275. See *id.* at 416-19, 572 A.2d at 555-57.

276. *Id.* at 419, 572 A.2d at 557.

277. See 319 Md. at 411-12, 572 A.2d at 553.

278. *United States v. McDonald*, 456 U.S. 1, 7 (1982).

Court of Appeals has followed this rule where Maryland statutory law providing a right to a speedy trial was allegedly violated.<sup>279</sup> In *Curley v. State*,<sup>280</sup> the Court of Appeals held that as long as the nol pros equi's purpose or effect was not to circumvent the statutory speedy trial requirement, its entry tolled the clock, and the clock runs anew when new charges are filed.<sup>281</sup> Thus, if the prosecution enters a nol pros for legitimate reasons, any new indictment is wholly independent of the original for purposes of the statutory right to a speedy trial.<sup>282</sup>

Because the statutory speedy trial requirements are distinct from the constitutional right to a speedy trial,<sup>283</sup> the *Curley* holding does not necessarily control in the *Bailey* situation. Nevertheless, the use of similar principles in constitutionally-based claims is appropriate.

The Court of Special Appeals viewed the nol pros issue as the case's central issue. The court reasoned that its outcome "hinged" on whether the nol pros was legitimate so as to stop the speedy trial clock until the new charges were filed, in which event the State would prevail. On the other hand, if the nol pros was not legitimate, the clock was not tolled and the delay's length was the entire two year period. Under those circumstances, the defendant would prevail. The Court of Appeals found that even under "the view most favorable to Bailey"—namely, that the entire period between his arrest and trial was relevant to the analysis—his sixth amendment right had not been violated.<sup>284</sup> Although the delay was sufficiently long to be "presumptively prejudicial" so as to trigger the balancing test,<sup>285</sup> that test yielded a finding of no constitutional violation.

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279. See, e.g., *Curley v. State*, 299 Md. 449, 474 A.2d 502 (1984); *State v. Glenn*, 299 Md. 464, 474 A.2d 509 (1984). The relevant statutory provision is Article 27, § 591 (1987), which is implemented by Md. R. 4-271.

280. 299 Md. 449, 474 A.2d 502 (1984).

281. See *id.* at 462, 474 A.2d at 508; see also *Lee v. State*, 61 Md. App. 169, 485 A.2d 1014 (1985) (although the negligent misplacement of the defendant's request for disposition was not done in bad faith, it nonetheless caused the indictment's dismissal, and cannot be considered equivalent to a good faith dismissal).

282. See *Curley*, 299 Md. at 462, 474 A.2d at 508; *Glenn*, 299 Md. at 466-67, 474 A.2d at 511.

283. See *State v. Brown*, 307 Md. 651, 657, 516 A.2d. 965, 968 (1986). Unlike statutes or rules in many other jurisdictions, Maryland's section 591 and rule 4-271 "were not intended to be codifications of the constitutional speedy trial right but 'stand on different legal footing.'" *State v. Frazier*, 298 Md. 422, 428, 456, 470 A.2d 1269, 1272, 1295 (1984). The statutory provision's chief purpose was to serve as a prophylactic measure to further society's interest in the prompt disposition of criminal trials. See *id.*

284. See 319 Md. at 415, 572 A.2d at 555.

285. See *id.* at 411, 572 A.2d at 553.

Thus, it is an open question in Maryland whether a legitimate nol pros stops the clock for constitutionally based claims.

Viewing the delay resulting from nol pros filings in the light most favorable to defendants broadens the range of cases that trigger the speedy trial analysis. Under the majority's approach, delays that would not rise to "constitutional dimensions" if a nol pros stopped the clock may now invoke the balancing test. Courts thus may be forced unnecessarily to apply the difficult and sensitive balancing test. The question of how to treat nol proses remains for future resolution.

4. *Conclusion.*—In *State v. Bailey*, the Court of Appeals held that Bailey was not denied his sixth amendment right to a speedy trial even though there was a two year and nine day delay between his arrest and his trial.<sup>286</sup> In arriving at this conclusion, the majority emphasized the absence of actual prejudice, rather than conforming to the traditional analysis of balancing the length of delay, the reason for delay, the defendant's assertion of the right, and actual prejudice in light of the case's particular circumstances. Despite case law to the contrary, this could signal that in future cases the Court of Appeals will give greater weight to the actual prejudice factor.

The court did not decide the effect of a nol pros on the speedy-trial clock. By assuming that the delay resulting from a nol pros was chargeable to the State, the court may have expanded the scope of cases in which the constitutional speedy trial claim is implicated. The decision leaves this question for future consideration.

Nonetheless, in light of the right's subjectiveness and the balancing test's nature, *Bailey* may not significantly alter the manner in which cases are decided. The outcome of each claim will remain fact dependent. Perhaps *Bailey* merely illustrates that in cases mirroring these facts, courts may apply the balancing test with even greater flexibility.

#### D. Loud Noise Statute and the First Amendment

In *Eanes v. State*,<sup>287</sup> a divided Court of Appeals upheld the conviction of an anti-abortion protestor prosecuted under a statute<sup>288</sup> proscribing "loud and unseemly" noise.<sup>289</sup> Though the protestor

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286. See *id.* at 420-21, 572 A.2d at 557.

287. 318 Md. 436, 569 A.2d 604 (1990).

288. MD. ANN. CODE art. 27, § 121 (1987).

289. See 318 Md. at 468, 569 A.2d at 619-20. Judge Adkins wrote the court's opinion, joined by Chief Judge Murphy and Judges Rodowsky and McAuliffe. See *id.* at 440, 569

spoke without amplification, during the daytime, and on a public sidewalk in downtown Hagerstown, the court held that the statute's application was constitutional.<sup>290</sup>

In upholding the statute and the protestor's conviction, the court treated the statute as a content-neutral restriction on the time, place, and manner of speech.<sup>291</sup> The court interpreted the words "loud and unseemly" to mean "unreasonably loud," and added several requirements to the statute as predicates to its enforcement.<sup>292</sup> The result is perhaps the first reported decision by a state's highest court sanctioning a conviction arising from unamplified, constitutionally-protected speech delivered in a traditional public forum, merely because the speaker spoke too loudly.<sup>293</sup>

1. *The Case.*—Jerry Eanes was convicted of violating a Maryland statute by disturbing the peace.<sup>294</sup> The statute makes it unlawful for a person to "wilfully disturb any neighborhood . . . by loud and unseemly noises . . . ." <sup>295</sup> The offense occurred during an anti-abortion demonstration on a public street in front of a Hagerstown abortion clinic.<sup>296</sup> The defendant and another man were part of a small demonstration in front of the clinic, which was located in a neighborhood containing other businesses and some residential apartments. Eanes' role was "'to preach the gospel of Jesus Christ.'" <sup>297</sup> Mr. Eanes testified that his intended audience was "'not just . . . the people in [the clinic] building . . . . I was speaking to the general people that were in that area . . . .'" <sup>298</sup>

Although Eanes spoke without amplification equipment, his voice was quite loud, and several people in the neighborhood complained to police that they were disturbed by the volume of his preaching.<sup>299</sup> The police warned Eanes to lower his voice, but he

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A.2d at 605-06. Judge Eldridge dissented, joined by Judges Cole and Blackwell. *See id.* at 469, 500, 569 A.2d at 620, 636.

290. *See id.* at 468, 569 A.2d at 620.

291. *See id.* at 449, 569 A.2d at 610. Specifically, the court read the statute as a restriction on the manner (loudness) of expression. *See id.*

292. *See id.* The court held that police may act under the statute only upon receiving a citizen's complaint, and only after warning the speaker. *See id.* at 463-64, 569 A.2d at 617-18.

293. *See id.* at 469, 569 A.2d at 620 (Eldridge, J., dissenting).

294. *See Eanes*, 318 Md. at 442, 569 A.2d at 607.

295. MD. ANN. CODE art. 27, § 121 (1987).

296. *See* 318 Md. at 441, 569 A.2d at 606.

297. *Id.*

298. *Id.* at 443, 569 A.2d at 607.

299. *Id.* at 441, 569 A.2d at 606. Witnesses described Eanes' conduct as "'screaming

refused, and they arrested him.<sup>300</sup>

In the Washington County district court, and later in the circuit court, Eanes was found guilty of violating the disturbing-the-peace statute.<sup>301</sup> The Court of Appeals granted certiorari<sup>302</sup> to consider whether the statute could be "used by the State to limit the volume level of speech protected by the first amendment to the United States Constitution."<sup>303</sup>

## 2. *Legal Background and the Court's Reasoning.*—

*a. Free Speech Generally.*—The first amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ."<sup>304</sup> This command applies to the states through the fourteenth amendment.<sup>305</sup> Despite the amendment's sweeping language, the Supreme Court has long held "that the state may sometimes curtail speech when necessary to advance a significant and legitimate interest."<sup>306</sup>

The first step in evaluating a speech restriction's constitutionality is determining whether the restriction affects "protected speech."<sup>307</sup> The Constitution does not protect all speech.<sup>308</sup> Certain categories of speech "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the

without screeching,' 'shouting and screaming,' 'yelling and screaming at the top of his voice.'" *Id.* at 442, 569 A.2d at 607.

300. *See id.*, 569 A.2d at 606.

301. *See id.*, 569 A.2d at 607; MD. ANN. CODE art. 27, § 121 (1987).

302. *See Eanes v. State*, 315 Md. 223, 554 A.2d 351 (1989).

303. 318 Md. at 440, 569 A.2d at 606. The decision considered only the first amendment, and not the "similar guarantee under Article 40 of the Maryland Declaration of Rights." *Id.* at 440 n.1, 569 A.2d at 606 n.1.

304. U.S. CONST. amend. I.

305. *See Gitlow v. New York*, 268 U.S. 652 (1925) (New York "anarchy" statute did not violate the constitutional guarantee of freedom of speech).

306. *City Council v. Taxpayers For Vincent*, 466 U.S. 789, 804 (1984) (upholding the Los Angeles Municipal Code prohibiting posting signs on public property) (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

307. *See* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 (2d ed. 1988) (describing the "two-track" approach to first amendment analysis, which divides speech into protected and unprotected classes). *But see* Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195 (1987) (criticizing the two-tier approach).

308. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

social interest in order and morality.”<sup>309</sup> For example, speech likely to precipitate violence (“fighting words”) is not constitutionally protected.<sup>310</sup>

The State’s ability to restrict speech also depends upon the forum in which the speech takes place. The Supreme Court applies the highest scrutiny to regulation of speech in forums that are traditional places for public speech.<sup>311</sup> Thus, speech delivered in public streets and parks “which by long tradition or by government fiat have been devoted to assembly and debate” is protected by a higher standard than speech delivered elsewhere.<sup>312</sup>

Speech restrictions are also differentiated by whether they are “content-based”<sup>313</sup> or “content-neutral.”<sup>314</sup> Regulation that is content-based is subject to strict scrutiny,<sup>315</sup> while regulations that restrict speech without regard to its content receive a lesser degree of scrutiny.<sup>316</sup>

*b. Content-Neutral Regulation of Speech.*—The State may restrict the time, place, and manner of speech to serve legitimate government interests.<sup>317</sup> In order to meet constitutional standards, these restrictions must be neutral in content, narrowly tailored to serve a

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309. *Id.*

310. *See id.*; *Diehl v. State*, 294 Md. 466, 451 A.2d 115 (1982) (describing “fighting words” and obscenity doctrine as applied in Maryland); *Reese v. State*, 17 Md. App. 73, 81-83, 299 A.2d 848, 854-55 (1973) (differentiating fighting words from words that are merely “annoying”); *Lynch v. State*, 2 Md. App. 546, 561, 236 A.2d 45, 54 (1967) (inflammatory racial speeches were fighting words because they presented a “clear and present danger” of inciting violence and thus were not protected by the first amendment). *But see Downs v. State*, 278 Md. 610, 617-18, 366 A.2d 41, 46 (1976), *cert. denied*, 431 U.S. 974 (1977) (verbal slurs against blacks and police officers directed to no one in particular held *not* to be fighting words). *See generally* L. TRIBE, *supra* note 307, §§ 12-8 to -10.

311. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)). *See generally* L. TRIBE, *supra* note 307, § 12-24.

312. *See Perry*, 460 U.S. at 45 (preferential access to interschool mail and teachers’ mailboxes did not violate the first amendment).

313. *See id.*

314. *See Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

315. *See id.*

316. The doctrine of content-neutral regulation of protected speech was recently restated in *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989); *see infra* notes 319-322 and accompanying text. For a description of the doctrine’s development and helpful analysis see generally Day, *supra* note 307.

317. *See Ward*, 109 S. Ct. at 2753-54; *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. International Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

significant government interest, and allow ample alternatives for expression.<sup>318</sup>

The Supreme Court recently discussed the doctrine of content-neutral restrictions in *Ward v. Rock Against Racism*.<sup>319</sup> The City of New York passed an ordinance requiring groups using the Central Park bandshell to follow certain procedures.<sup>320</sup> The Court upheld the ordinance as a valid content-neutral regulation.<sup>321</sup> The *Ward* decision stated that the test for content neutrality was "whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . The government's purpose is the controlling consideration . . . . Government regulation of expressive activity is content-neutral so long as it is 'justified without reference to the content of the regulated speech.'"<sup>322</sup>

A wide variety of government interests support content-neutral regulation of speech. These have included prevention of visual clutter on public property,<sup>323</sup> control of "secondary effects" surrounding adult movie houses,<sup>324</sup> protection of children from indecent radio broadcasts,<sup>325</sup> and protection of the privacy of other citizens.<sup>326</sup>

In addition to serving a significant government interest, a content-neutral regulation of speech must be "narrowly tailored," defined as "not substantially broader than necessary to achieve the

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318. See *Ward*, 109 S. Ct. at 2753-54; see also *Landover Books v. Prince George's County*, 81 Md. App. 54, 72, 566 A.2d 792, 801 (1989).

319. 109 S. Ct. 2746 (1989).

320. *Id.* at 2751-53. The ordinance required those using the bandshell also to use the City's amplification equipment and City personnel to operate it. See *id.* at 2752.

321. See *id.* at 2753.

322. *Id.* at 2754 (quoting *Clark v. Community for Creative Non-Violence*, 466 U.S. 288, 293 (1984) (other citations omitted)).

323. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 794 (1984) (cardboard campaign signs on public utility poles).

324. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (statute upheld prohibiting adult movie theatres within 1000 feet of any residential dwelling, church, park, or school); *Landover Books v. Prince George's County*, 81 Md. App. 54, 566 A.2d 792 (1989) (zoning ordinance prohibiting adult bookstore within 1000 feet of any residential zone, school, library, park or recreation facility, or church was upheld as content-neutral); *5297 Pulaski Hwy., Inc. v. Town of Perryville*, 69 Md. App. 590, 519 A.2d 206 (1987) (ordinance upheld requiring application for conditional use permit for adult bookstores).

325. See *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978) (afternoon broadcast of words describing sexual and excretory activities).

326. See *Ward*, 109 S. Ct. at 2753; *Frisby v. Schultz*, 487 U.S. 474 (1988) (picketing a personal residence); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (demonstrations disrupting a school); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (sound trucks).



government's interest."<sup>327</sup> This test allows the government considerable leeway. As stated in *Ward*, "a regulation of time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but it . . . need not be the least-restrictive or least-intrusive means of [achieving the desired ends]."<sup>328</sup>

The Supreme Court has held that in order to be valid, a restriction governing time, place, and manner of speech must provide ample alternatives for communication of the ideas that are incidentally restricted.<sup>329</sup> The Court has never rejected a statute for failing this test, nor has it provided much guidance in how the test applies. For example, in *Ward*, the Court stated that the guideline in question met this requirement because it had "no effect on the quantity or content of that expression beyond regulating the extent of amplification."<sup>330</sup> Moreover, the Court stated that "there has been no showing that the remaining avenues of communication are inadequate."<sup>331</sup>

c. *The Court's Reasoning.*—The Court of Appeals found that the disturbing-the-peace statute was a constitutionally valid restriction on the time, place, and manner of speech, both generally and as applied to Eanes.<sup>332</sup> In the court's view, the statute was justified by the substantial government interest in protecting the privacy of citi-

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327. *Ward*, 109 S. Ct. at 2753.

328. *Id.* at 2757-58. *But see* *Sable Communications, Inc. v. Federal Communications Comm'n*, 109 S. Ct. 2829, 2836 (1989) (statute denying all access to "dial-a-porn" services not sufficiently narrow to meet legitimate end of protecting children).

329. *See Ward*, 109 S. Ct. at 2753.

330. *Id.* at 2760.

331. *Id.* (citing *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 & n.23, 812 & n.30 (1984); *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949)). The range of alternatives that the Court has approved suggests that almost any "reasonable alternative" will satisfy the test. *See, e.g.,* *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (alternatives to picketing a single residence were adequate; the picketers were generally free to picket in the neighborhood or to picket at places of business); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (zoning regulations upheld restricting adult movie theaters to certain areas; the areas set aside did not deny the theater owners "a reasonable opportunity to open and operate an adult theater."); *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 294-95 (1984) (restrictions on camping in certain areas upheld; the availability of other areas set aside for camping were adequate for whatever expressive purpose the act of sleeping might serve). *But see* *Young v. American Mini Theaters*, 427 U.S. 50, 71 n.35 (1976) (cautioning against using restrictive zoning to suppress speech).

332. *See Eanes*, 318 Md. at 468, 569 A.2d at 620; *see* MD. ANN. CODE art. 27, § 121 (1987). The court was untroubled by a prior decision, *Diehl v. State*, 294 Md. 466, 451 A.2d 115 (1982), *cert. denied*, 460 U.S. 1098 (1983), in which it construed § 121 as a content-based regulation. The court did not overrule *Diehl*, but held that case applicable

zens who find themselves a "captive audience."<sup>333</sup> The court required, however, that the police warn the speaker prior to an arrest, and that such action be taken "only upon receipt of a complaint from an affected citizen," which forms the basis for a reasonable belief that the statute has been violated.<sup>334</sup> The court upheld Eanes' conviction because these steps were taken, and the state successfully proved that Eanes' voice was so loud under the circumstances as to be unreasonably intrusive.<sup>335</sup>

The court also rejected Eanes' claim that the statute was unconstitutionally vague.<sup>336</sup> Though the court conceded that the statute's "loud and unseemly" language was imprecise, it held that this phrase meant "unreasonably loud in the circumstances," and found constitutionally permissible this sort of objective, normative standard.<sup>337</sup>

3. *Analysis.*—The *Eanes* court upheld a statute regulating protected speech, even though the speech took place in the traditional public forum of a public street corner. In applying the content-neutral doctrine, the court faced several strong arguments against the statute's constitutionality. First, the court previously treated the statute as content-based rather than content-neutral.<sup>338</sup> Second, the Supreme Court never had applied content-neutral noise volume regulation to the unamplified human voice.<sup>339</sup> Third, the statute arguably was vague and violated the "narrowly tailored" requirement for content-neutral regulation. In upholding Eanes' conviction over these arguments, the court took considerable liberty in construing the statutory language and in applying the narrowness, vagueness, and captive-audiences doctrines.

a. *Content Neutrality.*—The statute enforced against Eanes prohibited "loud and unseemly noise."<sup>340</sup> The court's logic in deter-

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only when the state uses § 121 to "regulate the content of speech." 318 Md. at 444, 569 A.2d at 608.

333. See *id.* at 449-51, 569 A.2d at 610-11.

334. See *id.* at 464, 569 A.2d at 617-18.

335. See *id.* at 468, 569 A.2d at 620.

336. See *id.* at 458-64, 569 A.2d at 615-18.

337. See *id.* at 461-63, 569 A.2d at 616-17.

338. See *Diehl v. State*, 294 Md. 466, 451 A.2d 115 (1982), *cert. denied*, 460 U.S. 1098 (1983).

339. "The Supreme Court has never held that the government has a legitimate interest in controlling the volume of unamplified political or social speech delivered in an appropriate place and at an appropriate time." 318 Md. at 478-79, 569 A.2d at 625 (Eldridge, J., dissenting).

340. See MD. ANN. CODE art. 27, § 121 (1987).

mining that the statute was content-neutral centered on its construction of this phrase as meaning "unreasonably loud."<sup>341</sup> This construction served two purposes. First, by reading "unseemly" as "unreasonable," and linking it directly to the word "loud," the court was able to construe the statute as regulating only the volume, and not the content, of speech.<sup>342</sup> The construction also distinguished *Eanes* from prior decisions, particularly *Diehl v. State*,<sup>343</sup> in which the prohibition against "loud and unseemly noise" was treated as a content-based restriction. In *Diehl*, the defendant screamed profanity at a policeman.<sup>344</sup> The court explicitly considered the content of his speech, and held that "Diehl's conduct must have advocated imminent lawless action and been likely to incite a breach of the peace in order to be proscribable by the State."<sup>345</sup>

The *Eanes* court recognized that *Diehl* treated the statute as content-based.<sup>346</sup> It insisted, however, that in *Eanes* the statutory language could be treated as content-neutral without overruling its prior decisions.<sup>347</sup> This is troubling because it leaves the statute facially valid both as a content-based regulation and a content-neutral regulation. If the arrest was based on volume alone, then "loud and unseemly" means "unreasonably loud," and the conviction's constitutionality is tested by the relatively lenient content-neutral standard. If, however, the conviction was based on the speech's objectionable content, then "loud and unseemly" continues to mean "loud and unseemly," and the conviction is tested by the much more speech-protective standards that apply to content-based restrictions. As the dissent noted, "[t]his is a great deal of flexibility for three little words."<sup>348</sup>

*b. Significant Government Interest.*—To support its decision, the court relied on the government's interest in protecting "captive audiences." According to the court, "[t]he notion of 'captive audience' involves the problem of the unwilling listener or viewer who

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341. See 318 Md. at 449, 569 A.2d at 610.

342. See *id.*

343. 294 Md. 466, 451 A.2d 115 (1982), *cert. denied*, 460 U.S. 1098 (1983).

344. See *id.* at 468, 451 A.2d at 116.

345. *Id.* at 472, 451 A.2d at 119.

346. See 318 Md. at 444-55, 569 A.2d at 608.

347. See *id.* at 445, 569 A.2d at 608 ("We did not in [*Diehl*], however, consider the argument the State at present raises before us: that the statute serves as a constitutionally valid content-neutral regulation of the volume level of protected speech.").

348. *Id.* at 488-89, 569 A.2d at 630 (Eldridge, J., dissenting). "How such flexibility can be deemed to constitute a 'narrowly tailored' regulation of speech is beyond my comprehension." *Id.*

cannot readily escape from the undesired communication, or whose own rights are such that he or she should not be required to do so."<sup>349</sup>

The Supreme Court first used this doctrine to permit regulating amplified sound trucks operating in urban areas.<sup>350</sup> Without such regulations, "in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would . . . be at the mercy of advocates of particular religious, social or political persuasions."<sup>351</sup> Since then, the captive audience doctrine has been applied to protect schools from disturbing noises,<sup>352</sup> to bar certain advertisements in city buses,<sup>353</sup> and to prohibit radio broadcast of indecent material.<sup>354</sup> But the Supreme Court has been quite clear in pointing out that a person is not captive if there are reasonable means of avoiding unwanted communications.<sup>355</sup>

The novelty of *Eanes*' application of the "captive audience" doctrine lies in the fact that *Eanes* spoke without mechanical amplification.<sup>356</sup> Because amplified speech carries greater potential for disruption than unamplified speech, prior anti-noise cases stressed the potential intrusiveness on unwilling listeners of amplified sound.<sup>357</sup> Nevertheless, the court explicitly rejected the notion "that amplification is a constitutional *sine qua non*."<sup>358</sup>

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349. *Id.* at 451, 569 A.2d at 611 (citing Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 NW. U.L. REV. 153, 195-97 (1972) ("suppression of the communication itself should thus be viewed as a last resort when less restrictive alternatives have failed.")).

350. See *Kovacs v. Cooper*, 336 U.S. 77, 78 (1948) (ordinance prohibited "loud and raucous noises" generated by amplifiers attached to motor vehicles); see also *Saia v. New York*, 334 U.S. 558, 560-61 (1948) (concerning loudspeaker permits); Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856 (1988); Comment, *"I'll Defend to the Death Your Right to Say It . . . But Not to Me"—The Captive Audience Corollary to the First Amendment*, 1983 S. ILL. U.L.J. 211 (1983).

351. *Kovacs*, 336 U.S. at 87.

352. See *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

353. See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (political advertising).

354. See *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978).

355. See, e.g., *Erzoznick v. City of Jacksonville*, 422 U.S. 205 (1975) (ban on drive-in movies containing nudity not valid because people could look away from the screen); *Cohen v. California*, 403 U.S. 15 (1971) (people in a courtroom are not captive audiences to inscriptions written on another's clothing).

356. See 318 Md. at 441, 569 A.2d at 606.

357. See, e.g., *Kovacs*, 336 U.S. at 96 (Frankfurter, J., concurring) ("Only a disregard of vital differences between natural speech, *even of the loudest spellbinders*, and the noise of sound trucks would give sound trucks the constitutional rights accorded to the unaided human voice." (emphasis added)); see also *Reeves v. McConn*, 638 F.2d 762 (5th Cir. 1981) (speaker of obscene or indecent words protected only when using unamplified voice).

358. 318 Md. at 456, 569 A.2d at 614.

The *Eanes* decision also expands the scope of the captive audience doctrine in Maryland, by applying it to speech delivered in a traditional public forum. If people living and working in a commercial district during working hours are a captive audience deserving protection, then there seems to be no time or place where the "unreasonably loud" speech would be lawful. As the dissent argued, the statute could be applied to noisy political demonstrations outside the Maryland State House in Annapolis.<sup>359</sup>

*c. Narrowly Tailored.*—The concepts of "narrowness" and "vagueness" are closely related. Narrowness, which is a first amendment requirement, means that the government must choose a means of regulation that "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."<sup>360</sup> A statute is unconstitutionally vague under the fourteenth amendment if it fails to give "fair notice" to those who might fall under its jurisdiction, or if it fails to give sufficient direction to enforcement authorities, possibly leading to arbitrary enforcement.<sup>361</sup>

The *Eanes* court held that the "reasonable volume" standard was not unconstitutionally vague: "[a] law is not vague simply because it requires conformity to an imprecise normative standard."<sup>362</sup> The court added a warning requirement to the statute because "a speaker exercising the legitimate rights of free speech may be unaware that his or her volume has reached a prohibitive level and has become unlawfully disruptive."<sup>363</sup>

The court also added a requirement that "police may act under this statute only upon receipt of a complaint from an affected citizen upon the basis of which the officer reasonably believes that the statute has been violated."<sup>364</sup> This requirement was intended to prevent the statute from conferring "impermissible discretion" on

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"Eanes would have it that a speaker could stand in front of a residence at two o'clock in the morning and shout at top volume as long as he or she pleased[,] provided a message was being conveyed. We disagree. If the State is able to prove that, under the circumstances, the human voice is so unreasonably loud as to be unreasonably intrusive on a captive audience, that is enough. . . . Captive auditors in their homes and places of business need not become an unwilling congregation for Eanes's street-preaching."

*Id.* at 456-57, 569 A.2d at 614 (citation omitted).

359. *See id.* at 474, 569 A.2d at 622-23 (Eldridge, J., dissenting).

360. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984).

361. *See* 318 Md. at 458-59, 569 A.2d at 615. For a discussion of Maryland's vagueness doctrine, see *Bowers v. State*, 283 Md. 115, 389 A.2d 341 (1978).

362. 318 Md. at 459, 569 A.2d at 615.

363. *Id.* at 463, 569 A.2d at 617.

364. *Id.* at 464, 569 A.2d at 617-18.

enforcement officers.<sup>365</sup> The dissent suggested that the requirement provides little protection, and noted that “[w]hen a particular speech is unpopular or unusual, I doubt that it will be difficult to find an affected citizen to complain, ostensibly because of the sound level.”<sup>366</sup>

With regard to the requirement that restrictions on the time, place, and manner of speech be narrowly tailored, the majority maintained that the statute “is tailored to respond to the individual circumstances and, as it is here construed, to regulate only that conduct which on balance can appropriately be limited consistent with the first amendment . . . .”<sup>367</sup> The Court confused the vagueness doctrine with the requirement for narrow tailoring, and failed to conduct the type of analysis suggested by leading Supreme Court cases.<sup>368</sup>

The Supreme Court held a statute to be narrowly tailored if it addressed particular places, or times, or manners in which particular means of communication would be regulated. In *Ward*, for example, the ordinance at issue regulated use of amplified sound equipment in a Central Park bandshell, a specific and narrowly defined means to protect the Park’s neighbors from concert noise.<sup>369</sup> By contrast, the statute at issue in *Eanes* does not regulate any specific time, place, or manner of speech.<sup>370</sup> This flexibility is inconsistent with the requirement for narrow tailoring.

*d. Alternative Means of Communication.*—The *Eanes* majority found that the statute allowed ample alternative means of communication.<sup>371</sup> “Nothing in [the statute] prevents a speaker from orally addressing passersby, or from distributing literature or carrying a sign which expresses his or her viewpoint.”<sup>372</sup> Although *Eanes* had

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365. See *id.*, 569 A.2d at 618.

366. See *id.* at 475, 569 A.2d at 623 (Eldridge, J., dissenting). For a general discussion of the government’s pretextual use of facially neutral regulations, see L. TRIBE, *supra* note 307, at § 12-5 to -6.

367. 318 Md. at 457-58, 569 A.2d at 614.

368. See, e.g., *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2757-58 (1989); *Frisby v. Schultz*, 487 U.S. 474, 484-88 (1988); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

369. See *Ward*, 109 S. Ct. at 2756; see also *Frisby*, 487 U.S. at 483 (regulation prohibited only picketing directed at a single residence “proceed[ing] on a definite course or route in front of a home”).

370. The court described the statute as regulating the “manner” of communication as it is “informed” by the elements of time and place. 318 Md. at 449, 569 A.2d at 610.

371. See *id.* at 458, 569 A.2d at 614.

372. *Id.*, 569 A.2d at 614-15. Thus, the court concluded “[t]hat a speaker’s potential aural audience may be limited by the inability to stand outside a residence or business

alternatives, he was engaged in "the most basic form of free speech,"<sup>373</sup> and the alternatives are arguably less effective ways of communicating his ideas.

4. *Conclusion.*—In *Eanes*, the Court of Appeals applied questionable first amendment analysis to a general disturbing-the-peace statute. Public speakers in Maryland, whose speech is constitutionally protected and delivered in a traditional public forum, should not be held criminally liable merely for speaking in an unreasonably loud manner.

### E. Employee Drug Testing

In *City of Annapolis v. United Food and Commercial Workers, Local 400*<sup>374</sup> the Court of Appeals ruled that a mandatory suspicionless drug testing program targeting government employees withstood constitutional scrutiny.<sup>375</sup> The court held that the city's proposed program for testing its police and fire fighters did not violate the fourth amendment's prohibition against unreasonable searches and seizures.<sup>376</sup> The court found that employees had a diminished expectation of privacy because they already had consented to urinalyses during routine physical examinations.<sup>377</sup> The court adopted reasoning similar to that applied by the Supreme Court in the companion cases of *National Treasury Employees Union v. Von Raab*<sup>378</sup> and *Skinner v. Railway Labor Executives Association*<sup>379</sup> decided earlier in the year.

1. *The Case.*—In Annapolis, uniformed police and fire fighters must undergo periodic physical examinations to ensure in light of their occupational demands that they continue to be fit and in good health.<sup>380</sup> The examination includes urinalysis to detect medical ail-

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and scream a message to the unwilling listener therein is of little consequence when there are ample alternative channels of conveying that communication which have not been shown to be inadequate." *Id.*, 569 A.2d at 615.

373. *Id.* at 492, 569 A.2d at 631 (Eldridge, J., dissenting).

374. 317 Md. 544, 565 A.2d 672 (1989).

375. *See id.* at 566, 565 A.2d at 683.

376. *Id.*; U.S. CONST. amend. IV. The fourth amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." *Id.*

377. *See* 317 Md. at 553, 565 A.2d at 676.

378. 489 U.S. 656 (1989).

379. 489 U.S. 602 (1989).

380. *United Food and Commercial Workers*, 317 Md. at 545-46, 565 A.2d at 672-73.

ments. In September 1986, the City initiated a program to further test the urine samples for the presence of illegal drugs;<sup>381</sup> all collected samples would be tested without individualized suspicion that an employee uses drugs.<sup>382</sup> The new examination would occur annually, and employees would be given adequate notice of its exact time.<sup>383</sup>

Notwithstanding their support of improved safety and efficiency in the work environment, unions representing police and fire fighters disagreed with the City over the proposal's details.<sup>384</sup> Frustrated by the stalemate, the City filed a complaint with the Maryland Mediation and Conciliation Service<sup>385</sup> in October 1987, alleging that the unions were breaching their collective bargaining agreements by failing to negotiate in good faith.<sup>386</sup> After a hearing, the Mediation Service found constitutional the mandatory, suspicionless drug testing because the employees already submitted to testing pursuant to their periodic physical examinations.<sup>387</sup> After concluding that the two sides would never reach an agreement, the Mediation Service informed the City that it could execute its plan.

The unions sought judicial review of the ruling in the Circuit Court for Anne Arundel County, asking the court to enjoin the program's implementation and to remand the case to the Mediation Service with instructions to order further negotiations.<sup>388</sup> After de-

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381. *Id.*

382. *Id.* at 545, 565 A.2d at 672.

383. *Id.* at 546, 565 A.2d at 673. According to the plan, the examination would be scheduled during the employee's "birthday" month, with 30 days prior notice of the examination week, and 48 hours notice of the exact time. *See id.*

384. *See id.*

385. *See id.* at 546-47, 565 A.2d at 673. The Maryland Mediation and Conciliation Service (the Mediation Service) is authorized to act on behalf of the Commissioner of Labor and Industry to investigate labor disputes and to mediate them if the dispute "may result in a strike or lockout." MD. ANN. CODE art. 89, § 3 (1985).

386. 317 Md. at 547, 565 A.2d at 673. The City filed the complaint pursuant to the Annapolis City Code, which prohibits a union from refusing to negotiate with the City in good faith—an unfair labor practice. *See* ANNAPOLIS, MD., CITY CODE § 3.32.070(A) (1986). The Code also authorizes the Mediation Service to hear all claims of unfair labor practices. *See id.* § 3.32.070(B).

387. 317 Md. at 548, 565 A.2d at 674.

388. *See id.*, 565 A.2d at 673-74. The unions maintained that the program was unconstitutional under both the state and federal constitutions because it lacked a reasonable suspicion requirement for testing. *See id.* For the text of the Maryland constitutional provision, see *infra* note 398. The unions claimed that the Maryland Administrative Procedure Act gave the court authority to review the decision. *See* 317 Md. at 548, 565 A.2d at 674 (citing MD. STATE GOV'T CODE ANN. §§ 10-101 to -217 (1984 & Supp. 1990)). The circuit court disagreed with the unions, concluding that the Mediation Service's ruling was not appealable because the Service was not an agency "authorized by law to adjudicate contested cases." 317 Md. at 548, 565 A.2d at 674; *see* MD. STATE GOV'T



termining that the drug testing constituted a "search"<sup>389</sup> under the fourth amendment, the circuit court applied a balancing test, weighing the employee's privacy interests against the legitimate governmental interests.<sup>390</sup> The court concluded that the testing violated the fourth amendment because there was neither individualized suspicion nor generalized suspicion of a drug problem in the work force.<sup>391</sup> Consequently, it granted the unions' request for a writ of mandamus enjoining the program's implementation.<sup>392</sup>

The City appealed, and the Court of Appeals granted certiorari prior to review by the Court of Special Appeals because of the constitutional issues involved.<sup>393</sup> The Court of Appeals relied heavily on the *Von Raab* and *Skinner* opinions and reversed the lower court's decision.<sup>394</sup>

## 2. *Legal Background.*—

a. *Defining a "Search."*—The fourth amendment protects citizens from certain kinds of searches.<sup>395</sup> In *Katz v. United States*,<sup>396</sup> the

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CODE ANN. § 10-201 (b)(1), (2) (1984). Despite this determination, the circuit court issued a writ of mandamus enjoining the program's implementation. See 317 Md. at 548-49, 565 A.2d at 674.

389. See *id.* at 549, 565 A.2d at 674. The Court of Appeals, with little discussion, agreed with this aspect of the circuit court decision, deferring to the Supreme Court's judgment in *Skinner* that urine testing invades an individual's reasonable expectation of privacy. See *id.* at 551, 565 A.2d at 675. The *Skinner* opinion, in turn, drew support from the conclusion reached unanimously by the federal Courts of Appeals that urine testing is a "search" under the fourth amendment. See *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. at 617-18 n.4.

In *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988), *vacated sub nom. Penny v. Kennedy*, 915 F.2d 1065 (1990) (en banc), the Sixth Circuit reasoned:

The act of urinating is one of the most private of all activities. The subjective expectation of privacy felt by many individuals when urinating is undoubtedly one that society is prepared to consider reasonable. There are few other times where individuals insist as strongly and universally that they be let alone to act in private. Furthermore, the information that may be gleaned from the analysis of an individual's urine compels the conclusion that a mandatory urinalysis, whether directly observed or not, constitutes a "search" within the meaning of the fourth amendment.

*Id.* at 1542-43.

390. See 317 Md. at 549, 565 A.2d at 674.

391. See *id.* at 550, 565 A.2d at 675.

392. See *id.* at 548-49, 565 A.2d at 674.

393. See *id.* at 550, 565 A.2d at 675.

394. See *id.* at 567, 565 A.2d at 683.

395. See U.S. CONST. amend. IV. For the text of the fourth amendment, see *supra* note 376.

396. 389 U.S. 347 (1967) (forbidding introduction of evidence secured without a search warrant by attaching a listening device to a public phone booth).

Supreme Court defined a "search" as any invasion wherein the person had a reasonable expectation of privacy with respect to the thing searched.<sup>397</sup> In a similar provision, article 26 of the Maryland Declaration of Rights prohibits issuance of general warrants, and warrants without oath or affirmation;<sup>398</sup> it is construed in the same way as the fourth amendment.<sup>399</sup> Decisions involving federal constitutional rights are very persuasive, though not controlling, authority for interpreting the state constitution and state statutes.<sup>400</sup>

In *Jones v. McKenzie*,<sup>401</sup> the United States Court of Appeals for the District of Columbia decided that urinalysis testing government employees for drugs constitutes two searches: (1) invading the privacy surrounding the act of urination itself, and (2) intruding upon the personal matters revealed by the analysis of the sample.<sup>402</sup> Relying on this approach, the Court of Appeals in *United Food and Commercial Workers* analyzed both intrusions.<sup>403</sup>

*b. Breaking Away from the Probable Cause Requirement.—*

(1) *Extenuating Circumstances.*—Generally, the Supreme Court has adopted a strict reading of the fourth amendment's text, invalidating any search conducted without a warrant based on probable cause.<sup>404</sup> In a select group of cases,<sup>405</sup> the Court relaxed this stan-

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397. See *id.* at 361 (Harlan, J., concurring).

398. See MD. CONST. DECL. OF RTS. art. 26. Article 26 provides:

That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous [grievous] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

*Id.* (brackets in original).

399. See *Blum v. State*, 94 Md. 375, 382, 51 A. 26, 29 (1902) (noting the fourth and fifth amendments to the United States Constitution, and articles 26 and 22 of Maryland's Declaration of Rights are intimately related, and shed great light on each other).

400. See *Gahan v. State*, 290 Md. 310, 322, 430 A.2d 49, 55 (1981); see also *Lambert v. State*, 196 Md. 57, 62, 75 A.2d 327, 329 (1950) ("decisions of the Supreme Court on the kindred 4th Amendment are entitled to great respect").

401. 833 F.2d 335 (D.C. Cir. 1987), *vacated sub nom. Jenkins v. Jones*, 109 S. Ct. 1633 (1989).

402. See *id.* at 340 n.11. Because of this double intrusion, the court reasoned that the employee's privacy interest was not diminished by the mere fact that tests were conducted in the privacy of a restroom. See *id.*

403. See 317 Md. at 553, 565 A.2d at 676.

404. See, e.g., *Payton v. New York*, 445 U.S. 573 (1980) (holding unconstitutional the warrantless search of a suspect's home in the absence of exigent circumstances); *Mincey v. Arizona*, 437 U.S. 385 (1978) ("murder scene" exception to the fourth and fourteenth amendments is not consistent with those amendments, and does not justify a four day warrantless search of the suspect's apartment).

dard when extenuating circumstances surrounded the search. Thus, in the leading case of *Terry v. Ohio*,<sup>406</sup> the Court found it permissible for a police officer to "frisk" a subject without probable cause to arrest, so long as the officer's suspicion was reasonable and based on objective, relevant facts.<sup>407</sup> The *Terry* decision's important legacy is its articulation of a two-tier test for determining the "reasonableness" of a search: (1) whether the search is "justified at its inception;"<sup>408</sup> and (2) whether the search is "reasonably related in scope to the circumstances which justified the interference in the first place."<sup>409</sup> The *Terry* test has been used to determine the reasonableness of other searches conducted without probable cause, including the reasonableness of drug testing.<sup>410</sup>

(2) "*Special Needs*."—Within the last five years, the Supreme Court has carved out of the probable cause requirement another category of exceptions. In *New Jersey v. T.L.O.*,<sup>411</sup> the Court upheld a school administrator's right to inspect a student's personal belongings based on the administrator's reasonable suspicion that she had violated a school rule.<sup>412</sup> Even though the Court recognized that the fourth amendment applies to civil searches,<sup>413</sup> it was willing to

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405. See, e.g., *Colorado v. Bertine*, 479 U.S. 367 (1987) (validating an inventory search conducted after a vehicle was legally impounded; the search was conducted to protect the owner's interest in the property, and to protect the police from false claims of theft); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (allowing an automobile search carried out at a fixed checkpoint along the national border); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (upholding the constitutionality of a search incident to a lawful arrest conducted without probable cause or reasonable suspicion).

406. 392 U.S. 1 (1968).

407. See *id.* at 21-22 ("in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"). The Court of Appeals has approved the use in Maryland of the *Terry* reasonableness standard. See *State v. Wilson*, 279 Md. 189, 367 A.2d 1223 (1977) (using the *Terry* standard, but holding that it was not met if the officer was searching for evidence of a crime, and physical safety concerns were not apparent).

408. 392 U.S. at 20.

409. *Id.*

410. See *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1544 (6th Cir. 1988), *vacated sub nom. Penny v. Kennedy*, 915 F.2d 1065 (1990) (en banc).

411. 469 U.S. 325 (1985).

412. See *id.* at 327-28. The student was taken to the principal's office because she was allegedly caught smoking in the lavatory. *Id.* at 328. The student denied that she had been smoking and claimed that she did not smoke at all. The assistant vice-principal opened the student's purse and found not only the package of cigarettes but cigarette rolling paper. Based on this discovery, he further examined her purse and uncovered marijuana, other drug paraphernalia, a large amount of money, and some incriminating papers indicating that the student was involved in the sale of illegal drugs. See *id.*

413. See *id.* at 335.

accept a lesser standard of reasonableness when "public interest" demanded it.<sup>414</sup> Justice Blackmun, concurring in the judgment, cautioned that the balancing test is the exceptional standard for fourth amendment review,<sup>415</sup> but in certain cases, "special needs" greater than mere law enforcement render the probable cause standard unworkable.<sup>416</sup>

Two years later in *O'Connor v. Ortega*,<sup>417</sup> the Court found a "special need" in government workplaces.<sup>418</sup> An employee suspected of various wrongdoings stored some personal items in his office.<sup>419</sup> While the employee was on compulsory administrative leave, his supervisor searched the office without the employee's knowledge or consent, on the pretext that an inventory of government property was in progress.<sup>420</sup> Upon review, the Court, citing the *T.L.O.* opinion, agreed with the Court of Appeals for the Ninth Circuit<sup>421</sup> that an employee has an expectation of privacy even when civil authorities conduct the search.<sup>422</sup> Nevertheless, it remanded the case because it found that the employee's expectation of privacy may be reduced by actual office procedure, or by valid government regulations.<sup>423</sup>

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It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or 'writs of assistance' to authorize searches for contraband by officers of the Crown. But this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police.

*Id.* (citations omitted).

414. *See id.* at 341. In balancing the student's privacy interest against the school's need to retain order and control, the Court determined that requiring a warrant "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* at 340.

415. *See id.* at 351 (Blackmun, J., concurring).

416. *Id.* Specifically, school supervisors lacked the requisite knowledge to make a judgment regarding the existence of probable cause. *See id.* at 353 (Blackmun, J., concurring).

417. 480 U.S. 709 (1987).

418. *See id.* at 725.

419. *Id.* at 712-13.

420. *Id.* The employee, a doctor at a state hospital, was suspected of improprieties in his supervision of the psychiatric residency program, including sexual harassment and unsuitable disciplinary actions. *See id.* at 712. Although the hospital initially claimed that the search was conducted as part of a routine state property inventory, there was no policy of inventorying the offices of employees who were on administrative leave. *Id.* at 713. Moreover, the papers were simply stored in boxes, and a formal inventory was never conducted. *Id.* at 714.

421. The Court of Appeals concluded without explanation that the search was unconstitutional. *Id.* at 714.

422. *See id.* at 715; *supra* note 413.

423. *See id.* at 717. The Court decided that a case by case analysis was proper because

The *O'Connor* Court balanced public employees' privacy interests in respect to their possessions with the "realities of the workplace."<sup>424</sup> The Court decided that in this context a probable cause requirement was neither warranted nor feasible.<sup>425</sup> Applying the *Terry* standard of reasonableness, the Court determined that the search was "justified at its inception"<sup>426</sup> because the employer had individualized suspicion of the employee's wrongdoings. Nevertheless, it remanded the case to determine whether the scope of the intrusion was reasonable.<sup>427</sup>

The "special needs" doctrine also arose in *Griffin v. Wisconsin*,<sup>428</sup> wherein the Court allowed probation officers acting pursuant to a state regulation to search without a warrant a probationer's home.<sup>429</sup> The search ensued after a tip from a police officer led the probation department to conclude that "reasonable grounds" existed to surmise that the probationer illegally possessed contraband.<sup>430</sup> In this case, the government's interests in the probationer's rehabilitation and the protection of the community encompassed a "special need."<sup>431</sup> Unlike a police officer, a probation officer is presumed to have his charge's best interests in mind.<sup>432</sup> Moreover, a probationer has a lesser expectation of privacy than a citizen free from the penal system's constraints.<sup>433</sup> The Court decided that requiring a warrant would hamper a quick response to suspected misconduct;<sup>434</sup> likewise, a probable cause re-

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some government offices may be so open that employees would have no reasonable expectation of privacy. *See id.* at 718.

424. *Id.* at 721. The Court suggested that "realities of the workplace" might include a co-worker's need to retrieve work-related files or correspondence, and routine inventories performed to secure state property. *See id.* at 721-22.

425. *See id.* at 725.

426. *Id.* at 726. But the Court declined to decide whether a search could be reasonable absent individualized suspicion. *See id.* But *see* *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (validating a suspicionless drug testing program).

427. *See* 480 U.S. at 727-29 (the lower court's grant of summary judgment was inappropriate because the record was inadequate to assess the reasonableness of the search and the parties disputed its justification).

428. 483 U.S. 868 (1987).

429. *See id.* at 870-71. The regulation permits a probation officer to search a probationer's home without a warrant, subject to supervisory approval, and based on reasonable grounds that the probationer possesses contraband in violation of her probation. *See id.*

430. *Id.* at 871.

431. *See id.* at 875.

432. *Id.* at 876.

433. *Id.* at 874.

434. *See id.* at 876.

quirement would hamper the regulation's deterrent effect.<sup>435</sup> Finding the regulation constitutional, the Court declined to decide whether any search was lawful if based on "reasonable grounds."<sup>436</sup>

In *Von Raab* and *Skinner*, the Court expanded the "special needs" doctrine into the drug testing arena. The Court used three factors to support incorporating drug testing into the doctrine: (1) the search's civil nature; (2) the search's non-discretionary nature; and (3) the existence of a particular scenario that diminished the individual's reasonable expectation of privacy.<sup>437</sup> In *Von Raab*, the Court validated a program that required drug testing of any United States Customs personnel who sought promotion into areas that involved drug interdiction or carrying firearms.<sup>438</sup> Garnering support from the "special needs" precedent, the Court decreed that the Customs Service's duties would be jeopardized if the Service were required to obtain search warrants for "routine, yet sensitive, employment decisions."<sup>439</sup> Because only employees seeking promotion were tested, the Court conjectured that affected employees had prior knowledge of the regulations and that a warrant requirement would not more effectively protect the employee's privacy interest.<sup>440</sup> The Court defended the suspicionless search not as a response to evidence of a departmental drug problem, but as a response to a national dilemma.<sup>441</sup> An angry dissent chastised the majority for allowing the Government to flout fourth amendment protections in order to make a point about the seriousness of our nation's drug problem.<sup>442</sup>

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435. *See id.* at 878.

436. *See id.* at 880.

437. *See, e.g.,* *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667-68, 671-72 (1989).

438. *See id.* at 679. The United States Court of Appeals for the Fifth Circuit vacated the district court injunction and found that a customs agent using drugs would be susceptible to bribery and blackmail, and would be tempted to divert for his own use seized contraband. Moreover, a drug-impaired agent carrying a firearm could endanger himself, fellow agents, and the public. *See National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 178 (5th Cir. 1987), *aff'd in part, vacated in part on other grounds*, 489 U.S. 656 (1989).

439. 489 U.S. at 667. Once again, the Court drew attention to the non-criminal nature of the search, and emphasized that test results could not be turned over to prosecutors. *See id.* at 663.

440. *See id.* at 667.

441. *See id.* at 674 ("there is little reason to believe that American workplaces are immune from this pervasive social problem").

442. *See id.* at 686-87 (Scalia, J., dissenting). Moreover, Justice Scalia did not find plausible the majority's explanation of the government's "special need":

It is not apparent to me that a Customs Service employee who uses drugs is significantly more likely to be bribed by a drug smuggler, any more than a Cus-

*Skinner* concerned Federal Railroad Administration (FRA) regulations that compelled railroads to test employees for drug and alcohol use following major accidents or incidents.<sup>443</sup> Although the regulations required the railroad immediately to transport the involved crew members to a testing facility,<sup>444</sup> the Court established that the privacy interests aroused were "minimal" compared to the governmental interest at stake.<sup>445</sup> The Court concluded that railroad employees experienced a diminished expectation of privacy by virtue of their participation in a highly regulated industry;<sup>446</sup> moreover, the regulations required no direct observation of the sample collection, and personnel unrelated to the employer conducted the testing.<sup>447</sup> According to the majority, obtaining a warrant would be impracticable because the delay could lead to the destruction of evidence.<sup>448</sup> Furthermore, individualized suspicion would be difficult to ascertain in a serious accident's confusing aftermath.<sup>449</sup>

The *Von Raab* and *Skinner* decisions significantly broaden the "special needs" doctrine. It is applied for the first time to the search of a person; moreover, it is applied for the first time absent a finding of individualized suspicion. Justice Scalia dissented in *Von Raab*, and lamented that the fourth amendment has become "frail protection" if a national drug problem is the only justification necessary to uphold "demeaning bodily searches, without particularized suspicion."<sup>450</sup>

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toms Service employee who wears diamonds is significantly more likely to be bribed by a diamond smuggler—unless, perhaps, the addiction to drugs is so severe, and requires so much money to maintain, that it would be detectable even without the benefit of a urine test.

*Id.* at 682 (Scalia, J., dissenting).

443. See 489 U.S. 602, 609 (1989). The FRA promulgated drug-testing regulations after investigation indicated that prevalent drug and alcohol abuse in the railroad industry posed a threat to public safety. See *id.* at 607.

444. *Id.* at 609-10.

445. See *id.* at 624-25 (detaining an employee to procure urine and other samples was not a significant invasion of privacy because employees are ordinarily restricted in their movements during normal working hours and conditions).

446. See *id.* at 627.

447. *Id.* at 626-27.

448. See *id.* at 623-24.

449. See *id.* at 631. The *Skinner* dissent, however, was quick to point out that, unlike prior cases, test results were turned over to prosecutors. See *id.* at 650-51 (Marshall, J., dissenting). Justice Marshall also noted that the diminished privacy interest argument based on pervasive industry regulations had in the past been used only for searches of belongings. See *id.* at 648-49 (Marshall, J., dissenting).

450. 489 U.S. at 684 (Scalia, J., dissenting).

3. *Analysis.*—In *United Food and Commercial Workers*, the Court of Appeals embraced without discussion the “special needs” doctrine and adopted the same analysis applied by the Supreme Court. The opinion emphasized the civil nature of the search and stressed the fact that positive tests cannot be turned over to prosecutors without the employee’s consent.<sup>451</sup> The court reasoned that the absence of particularized suspicion alone does not transgress fourth amendment standards of reasonableness.<sup>452</sup> Where the Supreme Court drew the dissent’s fire for abandoning individualized suspicion,<sup>453</sup> the Court of Appeals used lack of individualized suspicion to support its holding; it argued that in situations in which everyone must undergo testing as part of a physical examination, no stigma attaches to testing.<sup>454</sup>

The court’s most powerful weapon to defeat the unions’ claims is that the employees already undergo urinalysis testing.<sup>455</sup> Because the employees did not object to this testing in the past, the court completely bypassed considering the intrusion involved in the taking of the sample.<sup>456</sup> The court indicated that it would consider the reasonableness of the intrusion, but quickly dismissed this inquiry, stating that the routine physical examination and urinalysis already exposed the “private facts” that drug testing would uncover because the examinations were instituted for that very purpose.<sup>457</sup> Thus, the court found the City’s interest in promoting the safety of the public, co-workers, and the employees themselves, sufficiently compelling to outweigh the minimal privacy interests involved.<sup>458</sup>

The Court of Appeals did a credible job applying the Supreme Court criteria, but it failed to undertake more than a superficial analysis of the facts—facts that could distinguish the case from both *Skinner* and *Von Raab*. In *Skinner*, there was strong evidence of an industry-wide drug problem,<sup>459</sup> but Annapolis admitted it had no evidence of any drug problem in either the police or fire departments.<sup>460</sup> Moreover, the railroad employees in *Skinner* were only

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451. See 317 Md. at 552, 565 A.2d at 676.

452. See *id.* at 564, 565 A.2d at 682.

453. See *Von Raab*, 489 U.S. at 684 (Scalia, J., dissenting); *Skinner*, 489 U.S. at 638 (Marshall, J., dissenting).

454. See 317 Md. at 557, 565 A.2d at 678.

455. See *id.* at 546, 565 A.2d at 672.

456. See *id.* at 553, 565 A.2d at 676.

457. See *id.* at 554, 565 A.2d at 677.

458. See *id.* at 563, 565 A.2d at 681.

459. See 489 U.S. at 606-07.

460. See Brief for Appellee at 26, *United Food and Commercial Workers*, (No. 89-38) (“At oral argument in the Circuit Court below, the City clearly enunciated the asserted basis



tested following an accident or suspicious behavior,<sup>461</sup> and not on a routine basis. A closer review of the facts of *United Food and Commercial Workers* and *Skinner* reveals more differences than similarities.

Although the facts of *United Food and Commercial Workers* and *Von Raab* are more consistent, an important distinction may be drawn. In *Von Raab*, Customs' employees were compelled to undergo testing only when seeking a new position.<sup>462</sup> Annapolis already required prospective police and fire fighters to undergo pre-employment drug screening<sup>463</sup> and because the *Von Raab* decision had held pre-employment drug testing constitutional, the union did not contest this issue.<sup>464</sup> But Annapolis was also attempting to test employees who were trying to retain current positions. The Court of Appeals could have found this testing beyond the scope of *Von Raab*--an interpretation that has already been articulated by at least one appellate court.<sup>465</sup>

Even if the Court of Appeals correctly found that the city's testing program was within the confines of *Skinner* and *Von Raab*, the court ignored its responsibility to address separately the state constitution,<sup>466</sup> which the opinion does not mention. The Court of Appeals could have determined that the state constitution affords greater protection to individual privacy interests than the recent Supreme Court interpretation of the fourth amendment.<sup>467</sup> Here again, other jurisdictions have seen fit to afford this protection in drug-testing cases.<sup>468</sup>

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for the proposed testing program: 'We have no evidence . . . that there is a drug use problem at all . . . [W]e're . . . trying to make sure that a problem never starts in the first place.'").

461. See *supra* note 443 and accompanying text.

462. See 489 U.S. at 660-61.

463. See Brief for Appellee at 22-23 ("Neither union has at any time objected to the suspicionless testing of applicants for police officer (and firefighter) positions . . . . Such testing has not been the subject of the preliminary injunction or writ of mandamus issued by the Circuit Court.").

464. See *id.*

465. See *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (the Department of Justice's drug testing program was too broad because it included persons who did not prosecute drug offenders).

466. A state constitution that affords the same protections as does the federal constitution would be superfluous. See Brief for American Civil Liberties Union of Maryland at 8, *United Food and Commercial Workers*, (No. 89-38). Although a state may not revoke rights granted by the federal constitution, it may provide its citizens with more expansive rights. See *id.* The determination of the state's highest court will be dispositive in interpreting the meaning of a provision in the state constitution. See *id.*

467. See *supra* note 398.

468. See, e.g., *Horsemen's Benevolent and Protective Ass'n, Inc. v. State Racing Comm'n*, 403 Mass. 692, 532 N.E.2d 644 (1989) (using state constitution to invalidate

4. *Conclusion.*—In *City of Annapolis v. United Food and Commercial Workers, Local 400*, the Court of Appeals followed the Supreme Court's lead both in adopting a "special needs" doctrine in search and seizure cases, and in placing employee drug testing under that doctrine. The Court of Appeals may continue to follow that lead and feel free to take the "special needs" doctrine to unknown and unlimited constitutional domains. But in its eagerness to support the Supreme Court and current public opinion, the Court of Appeals may have done a disservice to the citizens of Maryland by foregoing serious analysis of the state and federal constitutional rights to privacy.

#### F. *Protective Sweeps During In-Home Arrests*

In *Buie v. State (Buie II)*,<sup>469</sup> on remand from the Supreme Court, the Court of Appeals applied an objective standard to judge the reasonableness of a warrantless search conducted to protect the safety of police officers during an in-home arrest.<sup>470</sup> This discussion reviews the Supreme Court's ruling that protective sweeps<sup>471</sup> are constitutional when based on reasonable suspicion, and explores whether the Court of Appeals correctly interpreted that ruling in applying a purely objective standard. It concludes that the *Buie* opinion should be read narrowly to conform to the Supreme Court's rationale for permitting protective sweeps as an exception to the fourth amendment warrant requirement.

##### 1. *The Case.*—

a. *Buie I.*—On February 3, 1986, two individuals, one of whom was wearing a red running suit, robbed at gunpoint a pizza parlor in Prince George's County, Maryland.<sup>472</sup> That same day, the Prince George's County police obtained arrest warrants for Jerome Buie and his alleged accomplice, Lloyd Allen. The police then placed Buie's house under surveillance. Two days later, having established through a pretextual telephone call that Buie was at home, the po-

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random urine testing of owners, jockeys, and others in the horse racing industry); *Fraternal Order of Police v. City of Newark*, 216 N.J. Super. 461, 524 A.2d 430 (1987) (using state constitution to invalidate suspicionless urine testing of police officers).

469. [*Buie II*], 320 Md. 696, 580 A.2d 167 (1990), *cert. denied*, 111 S. Ct. 1011 (1991).

470. *See* 320 Md. at 703, 580 A.2d at 170.

471. The Supreme Court defined the term "protective sweep" as "a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland v. Buie*, 110 S. Ct. 1093, 1094 (1990).

472. *Id.* at 1095.

lice entered his house to execute the arrest warrant.<sup>473</sup> The officers did not have a search warrant for the house.<sup>474</sup>

Once inside, the officers moved throughout the house, with one of them guarding the basement stairs so that no one could come up and surprise them.<sup>475</sup> This officer twice called into the basement, ordering anyone in it to come out; Buie ultimately responded and emerged from the basement. After Buie was placed in custody, another officer entered the basement, ostensibly to search for other individuals.<sup>476</sup> In the basement, the officer seized a red running suit found in plain view that resembled the one used in the pizza parlor robbery.<sup>477</sup>

The trial court denied Buie's motion to suppress the running suit, and Buie was convicted of robbery with a deadly weapon and using a handgun in the commission of a felony.<sup>478</sup> The Court of Special Appeals affirmed, holding that when there is reason to believe that accomplices remain at large, a mere reasonable suspicion will justify a "*limited additional intrusion* to investigate the *possibility* of their presence" when performing an in-home arrest pursuant to an arrest warrant.<sup>479</sup>

The Court of Appeals reversed the Court of Special Appeals in a four to three decision, holding that the search and seizure were unconstitutional because the officers did not have probable cause to search the basement without a warrant.<sup>480</sup> At the heart of the

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473. *Id.*

474. *Buie II*, 320 Md. at 707, 580 A.2d at 172 (Adkins, J., dissenting). The Supreme Court has ruled that an arrest warrant gives the police authority to enter the subject's home when there is reason to believe she is within. *See Payton v. New York*, 445 U.S. 573, 603 (1980). Police may not, however, enter a third party's home absent a search warrant or exigent circumstances. *See Steagald v. United States*, 451 U.S. 204, 213-14 (1981).

475. 110 S. Ct. at 1095.

476. *Id.* The officer testified that he entered the basement "in case there was someone else" down there. *Id.* When asked at trial, the officer who guarded the stairs said that he was not worried about there being any danger. *Buie II*, 320 Md. at 708, 580 A.2d at 173.

477. 110 S. Ct. at 1095. If the officer's entry into the basement fell under a lawful exception to the warrant requirement, the seizure of the red running suit was legal because it was found in plain view, and the officer had probable cause to believe it was evidence of a crime. *See id.* at 1096. *See also Arizona v. Hicks*, 480 U.S. 321, 326 (1987) (probable cause is required to invoke the "plain view" doctrine).

478. 110 S. Ct. at 1095.

479. *Buie v. State*, 72 Md. App. 562, 575-76, 531 A.2d 1290, 1297 (1987) (emphasis in original) (citing 2 W. LAFAVE, SEARCH AND SEIZURE § 6.4(b) (2d ed. 1987), *rev'd*, 314 Md. 151, 550 A.2d 79 (1988), *vacated* 110 S. Ct. 1093 (1990)).

480. *See Buie v. State (Buie I)*, 314 Md. 151, 153, 550 A.2d 79, 80 (1988), *vacated* 110 S. Ct. 1093 (1990).

court's reasoning was its belief that because an individual enjoys a greater expectation of privacy at home than in public, courts should afford homes greater protection.<sup>481</sup> Weighing this privacy interest against the governmental interest served by the intrusion, the Court of Appeals determined that "to justify a protective sweep of a home, the government must show that . . . probable cause to believe that 'a serious and demonstrable potentiality for danger' exists."<sup>482</sup> The court ruled that the police did not have probable cause to believe that exigent circumstances existed, and therefore the lower court should have suppressed the running suit.<sup>483</sup> The Supreme Court granted certiorari,<sup>484</sup> and vacated and remanded.<sup>485</sup>

b. *The Supreme Court Opinion.*—In *Maryland v. Buie*,<sup>486</sup> the Supreme Court refused to adopt a bright-line rule that a protective search is per se valid whenever an in-home arrest is made pursuant to an arrest warrant for a violent crime.<sup>487</sup> Instead, relying on its reasoning in *Terry v. Ohio*<sup>488</sup> and *Michigan v. Long*,<sup>489</sup> the Court ap-

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481. See *Buie*, 314 Md. at 156, 159-60, 550 A.2d at 81, 83; *Doering v. State*, 313 Md. 384, 397, 545 A.2d 1281, 1287-88 (1988) (a person's expectation of privacy is much greater in the home than in an automobile). The fourth amendment provides that "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. If a warrantless search is valid under the fourth amendment, it must fall within one of the "well-recognized exceptions" to the warrant requirement. *Chimel v. California*, 395 U.S. 752, 763 (1969); see *Katz v. United States*, 389 U.S. 347, 356-57 (1967) (probable cause does not justify a warrantless search, except in "well-delineated exceptions").

482. *Buie I*, 314 Md. at 159-60, 550 A.2d at 83 (quoting *United States v. Kolodziej*, 706 F.2d 590, 596 (5th Cir. 1983) (in turn quoting *United States v. Smith*, 515 F.2d 1028, 1031 (5th Cir. 1975), cert. denied, 424 U.S. 917 (1976))). The court distinguished *Buie I* from other cases that allowed searches based on less than probable cause, such as *Terry v. Ohio*, 392 U.S. 1 (1968). See 314 Md. at 159-60, 550 A.2d at 83.

483. See *Buie I*, 314 Md. at 166, 550 A.2d at 86.

484. See *Maryland v. Buie*, 490 U.S. 1097 (1989).

485. See *Maryland v. Buie*, 110 S. Ct. 1093, 1095 (1990).

486. 110 S. Ct. 1093 (1990).

487. See *id.* at 1099. Furthermore, the Court decided that *Chimel v. California*, 395 U.S. 752 (1969), was not controlling. See 110 S. Ct. at 1099. *Chimel* held that during an in-home arrest pursuant to an arrest warrant, a warrantless search of an individual limited to the arrestee's grabbing area did not violate the fourth amendment. See *Chimel*, 395 U.S. at 763. The Court rejected *Chimel*'s applicability to *Maryland v. Buie* because 1) "*Chimel* was concerned with a full-blown search of the entire house for evidence of the crime for which the arrest was made . . . not the more limited intrusion contemplated by a protective sweep" and 2) "the justification for the search incident to arrest considered in *Chimel* was the threat posed by the arrestee, not the safety threat posed by [third parties in] the house." 110 S. Ct. at 1099; see *Stackhouse v. State*, 298 Md. 203, 208-09, 468 A.2d 333, 336-37 (1983) (discussing *Chimel*); 2 W. LAFAVE, SEARCH AND SEIZURE § 6.4(b) (2d ed. 1987 & Supp. 1991).

488. 392 U.S. 1 (1968).

489. 463 U.S. 1032 (1983).

plied a balancing test to find protective sweeps constitutional if they are based on reasonable suspicion.<sup>490</sup> The *Buie* Court concluded that a warrantless protective sweep conducted during an in-home arrest does not violate the fourth amendment "when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger. . . ."<sup>491</sup> A suspicion is reasonable if there are "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."<sup>492</sup>

The Supreme Court did not decide the *Buie* case on the merits. Instead, it vacated the Court of Appeals' judgment, and remanded the case for application of the new reasonable suspicion standard.<sup>493</sup>

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490. See 110 S. Ct. at 1097-98. The Supreme Court justified relaxing the probable cause standard for protective sweeps by analogizing the protective sweep at issue in *Maryland v. Buie* to the "stop and frisk" rule articulated in *Terry* and expanded in *Long*. See *id.* In *Terry* the Court found constitutional a brief, warrantless stop and limited frisk for weapons, based on the officer's reasonable suspicion that the person was engaged in wrongdoing and the "need for law enforcement officers to protect themselves . . . in situations where they may lack probable cause." *Terry*, 392 U.S. at 24. In *Long*, the Court extended the *Terry* principles to warrantless searches of automobiles. See *Long*, 463 U.S. at 1051-52. The Court said that automobile searches are constitutional when confined to the passenger compartment and places where weapons may be hidden, "if the police officer possesses a reasonable belief . . . that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id.* In effect, to protect the safety of police officers, "*Long* authorized a 'frisk' of an automobile for weapons." 110 S. Ct. at 1097.

491. 110 S. Ct. at 1099-1100; see *Long*, 463 U.S. at 1049-50; *Terry*, 392 U.S. at 21. The Court emphasized that even when justified, a protective sweep does not allow a full search of the premises, "but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." 110 S. Ct. at 1099 (footnote omitted).

492. 110 S. Ct. at 1098.

493. See *id.* at 1100. In concurring opinions, Justices Stevens and Kennedy disputed each other's view of whether the protective sweep of *Buie*'s house should be upheld on remand. Justice Stevens argued that the reasonableness standard requires police officers who conduct a protective sweep to have a subjective belief that they are in danger. See *id.* at 1100 (Stevens, J., concurring). Noting testimony of the officer guarding the door that "he was not worried about any possible danger," Stevens determined that this standard was not met. See *id.* Justice Kennedy countered that only objective reasonableness is necessary, and implied that compliance with police department policy on safety procedures is sufficient to constitutionally justify a protective sweep. See *id.* at 1101 (Kennedy, J., concurring). Justice Stevens' concurring opinion is also interesting because it suggested that a legitimate protective sweep requires the police to show that no safer alternative to the sweep existed. See *id.* at 1100 (Stevens, J., concurring). The Court as a whole is unlikely to accept this interpretation, however, because in other

c. *Buie II: The Court of Appeals' Decision on Remand.*—In a four to three decision on remand,<sup>494</sup> the Court of Appeals determined that reasonable suspicion must be tested from the view of a reasonable police officer acting under the same circumstances, and not from the view of the particular police officers involved in the search.<sup>495</sup> The majority was convinced by the Supreme Court's comparison of *Buie* with *Terry* and *Long* that the Court, without ever articulating the proper standard, intended courts to use an objective standard to evaluate reasonable suspicion.<sup>496</sup> Furthermore, the court felt that an objective standard was consistent with fourth amendment jurisprudence, and was supported by existing Maryland law.<sup>497</sup> Applying the objective standard of reasonable suspicion in evaluating the police officer's actions, the court ruled that the limited search of *Buie*'s basement was lawful because a reasonably prudent police officer, acting under similar circumstances, could reasonably suspect that someone dangerous was hiding there.<sup>498</sup>

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fourth amendment situations, it has rejected the less-intrusive alternative approach. See 2 W. LAFAYE, *supra* note 487, § 6.4(b), at 88-89 (Supp. 1991).

494. Judge McAuliffe, joined by Chief Judge Murphy and Judge Rodowsky, wrote a plurality opinion, and Judge Chasanow concurred in the result. Judge Adkins, who wrote the majority opinion in *Buie I*, wrote a dissenting opinion joined by Judges Eldridge and Cole, both of whom also joined him in the earlier decision. Judge Blackwell, the *Buie I* majority's fourth member, had since been replaced by Judge Chasanow, who became the swing vote on remand. See *Buie II*, 320 Md. at 697, 580 A.2d at 167; *Buie I*, 314 Md. 151, 550 A.2d 79 (1988).

495. See *Buie II*, 320 Md. at 700-03, 580 A.2d at 169-70.

496. See *id.* at 700-01, 580 A.2d at 169. The Supreme Court used language in *Terry* and *Long* suggesting an objective test: "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Michigan v. Long*, 463 U.S. 1032, 1050 (1983) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). The Supreme Court in *Maryland v. Buie*, however, never stated whether the police officers making the arrest must hold that belief, or if it may be inferred from the facts as judged against what a reasonable police officer would believe when faced with the same circumstances. See *Buie II*, 320 Md. at 700-01, 580 A.2d at 169. But the Court stated that the reasonableness standard for protective sweeps "is no more and no less than was required in *Terry* and *Long*." 110 S. Ct. at 1098.

497. See *Buie II*, 320 Md. at 701-03, 580 A.2d at 169-70.

498. See *id.* at 703, 706, 580 A.2d at 170, 172. The Supreme Court did not articulate a clear standard as to what facts establish reasonable suspicion and thus justify a protective sweep. See *id.* at 700-01, 580 A.2d at 169. The Maryland decision in *Buie II* is therefore important because it articulated several factors that can be considered to determine whether suspicion was reasonable. See Kelder & Statman, *The Protective Sweep Doctrine: Recurrent Questions Regarding the Propriety of Searches Conducted Contemporaneously with an Arrest On or Near Private Premises*, 30 SYRACUSE L. REV. 973, 1010-16 (1979). Some of the facts that the court in *Buie II* relied on as evidence sufficient to justify the protective sweep were: (1) the crime's dangerous nature—armed robbery, (2) the officers' knowledge that the crime weapon had not been recovered, and (3) commission of the crime with an accomplice who was unaccounted for at the time of *Buie*'s arrest. See *Buie II*, 320 Md. at 703-06, 580 A.2d at 170-71.

In a dissenting opinion, Judge Adkins criticized the majority for improperly broadening the Supreme Court's ruling. He believed that the majority, by relying on a purely objective standard of reasonableness, allowed protective sweeps in situations the Supreme Court specifically rejected as improper.<sup>499</sup> He interpreted the Supreme Court's opinion to define reasonableness as a subjectively-held articulable suspicion that is also objectively reasonable.<sup>500</sup> In his view, this standard was not met in *Buie*, rendering impermissible the protective sweep at issue.<sup>501</sup>

2. *Legal Background.*—The Supreme Court in *Maryland v. Buie* did not articulate whether reasonable suspicion must be judged under an objective standard or a subjective standard.<sup>502</sup> Therefore, to determine which was the proper standard to apply when evaluating a protective sweep's reasonableness, the Maryland Court of Appeals in *Buie II* reviewed the concept of reasonableness as applied in other fourth amendment cases.<sup>503</sup>

In *Stackhouse v. State*,<sup>504</sup> a case involving a protective sweep conducted to prevent destruction of evidence,<sup>505</sup> the Court of Appeals applied a subjective test, concerning itself "only with what the police officers believed at the time"<sup>506</sup> to determine whether the search's scope was proper.<sup>507</sup> Because the "state did not show that at the time of the search . . . the officers believed that [there was a] threat of the destruction of evidence," the court suppressed the evidence obtained in the sweep.<sup>508</sup>

On the other hand, in *Maryland v. Macon*,<sup>509</sup> the Supreme Court

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499. See 320 Md. at 706-07, 580 A.2d at 172 (Adkins, J., dissenting).

500. See *id.*

501. See *id.* at 709-14, 580 A.2d at 173-76 (Adkins, J., dissenting). Judge Adkins was impressed with the testimony of the officer guarding the basement that he was not worried about being in danger. See *id.* at 708-11, 580 A.2d at 173-74 (Adkins, J., dissenting). He explained that in his opinion the facts also failed to meet the majority's purely objective standard. See *id.* at 707-14, 580 A.2d at 172-76 (Adkins, J., dissenting).

502. See *Buie II*, 320 Md. at 700, 580 A.2d at 169.

503. See *id.* at 701-03, 580 A.2d at 169-70.

504. 298 Md. 203, 468 A.2d 333 (1983).

505. See *id.* at 206, 468 A.2d at 335. The Supreme Court has recognized that the threat of the destruction of evidence sometimes constitutes exigent circumstances justifying a warrantless search. See *Schmerber v. California*, 384 U.S. 757, 770-71 (1966); *Ker v. California*, 374 U.S. 23, 40-41 (1963).

506. 298 Md. at 220, 468 A.2d at 342.

507. See *id.* (any search beyond the arrestee's "wingspan" must be pursuant to a warrant or to an exception to the warrant requirement).

508. *Id.* at 220, 468 A.2d at 342.

509. 472 U.S. 463 (1985).

determined that the purchase by undercover police officers of allegedly obscene magazines shortly before the warrantless arrest of a sales clerk was not an illegal seizure, even though the police intended to use the magazines as evidence.<sup>510</sup> The Court noted that it would apply an "objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time . . . and not on the officer's actual state of mind at the time the challenged action was taken."<sup>511</sup>

The Supreme Court addressed the issue more recently in *Horton v. California*,<sup>512</sup> a case in which police without a warrant seized evidence that was in plain view but whose discovery was not inadvertent.<sup>513</sup> The Court remarked that applying an objective standard of conduct would better serve evenhanded law enforcement than would examining the police officer's subjective state of mind.<sup>514</sup> Indeed, many other fourth amendment cases have also applied an objective standard.<sup>515</sup> *Terry*, on which the Court of Appeals placed much emphasis,<sup>516</sup> strongly suggests that an objective standard for judging reasonableness allows greater judicial control of the police.<sup>517</sup>

Professor LaFave's treatise on search and seizure supports using an objective standard of reasonableness.<sup>518</sup> Professor LaFave

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510. See *id.* at 471.

511. *Id.* at 470-71 (citing *Scott v. United States*, 436 U.S. 128, 136, 138 (1978)). The Court in *Scott* also noted that even if an officer does not have a subjective basis for making a warrantless custodial arrest, the search still is valid if his actions were objectively justified. See *Scott*, 436 U.S. at 138.

512. 110 S. Ct. 2301 (1990).

513. See *id.* at 2304. It is interesting that Justice Stevens, who in *Horton* wrote the majority opinion urging an objective standard, wrote a concurring opinion in *Maryland v. Buie* promoting a subjective standard. Compare *id.* with *Maryland v. Buie*, 110 S. Ct. 1093, 1100 (1990) (Stevens, J., concurring).

514. See 110 U.S. at 2308-09 ("The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure . . .").

515. See *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2801 (1990) (police officer's determination of consent to enter must be judged against objective standard); see also *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("As in other Fourth Amendment contexts . . . the 'reasonableness' inquiry in an excessive force case is an objective one . . ."); *Michigan v. Chesternut*, 486 U.S. 567, 573-74 (1988) (objective standards used to determine whether a reasonable person, in view of circumstances, would have believed he or she was free to leave); *Herod v. State*, 311 Md. 288, 299, 534 A.2d 362, 367 (1987) (officer's subjective legal interpretation of basis for warrantless search is not controlling).

516. See *Buie II*, 320 Md. at 701-03, 580 A.2d at 169-70.

517. See 392 U.S. 1, 21-22 (1968) ("in making that assessment [reasonableness] it is imperative that the facts be judged against an objective standard"); *Kelder & Statman*, *supra* note 498, at 1007.

518. See 3 W. LAFAVE, *supra* note 487, § 9.3(a), at 424-25.



stated that the "reasonable belief" required for an arrest is not based on what the arresting officer "did or did not believe."<sup>519</sup> He concluded that there is no requirement to show that the officer had actual suspicion when evaluating the reasonableness required for a *Terry* stop.<sup>520</sup>

3. *Analysis.*—The Court of Appeals ruled that the reasonableness of a protective search must be judged from the view of an objective police officer in similar circumstances.<sup>521</sup> Courts usually apply this objective standard when reviewing police conduct in fourth amendment cases. This policy protects citizens against possible police excesses in performing their law enforcement duties, and subjects their conduct to the scrutiny of a detached and neutral judge. Police officers must point to specific and articulable facts that support intruding into a citizen's privacy so that a judge may later "evaluate the reasonableness of a particular search or seizure in light of the particular circumstances."<sup>522</sup> This avoids infringing citizens' constitutional rights based exclusively on police officers' "inarticulate hunches."<sup>523</sup> The fact-finder ignores a particular police officer's personal biases by judging his or her actions against what a reasonable police officer would have believed under similar circumstances.<sup>524</sup>

But focusing exclusively on the objective standard poses problems for ensuring constitutional protections similar to those posed by a standard that focuses solely on the police officers' subjective intent.<sup>525</sup> The danger of allowing the police to perform a protective sweep when it is objectively reasonable, but not supported by subjectively held reasonable suspicion, is that the police will use these situations as a pretext to perform a search that would otherwise require a search warrant.<sup>526</sup> If the police do not fear for

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519. *Id.* at 424.

520. *See id.* at 424-26.

521. *See Buie II*, 320 Md. at 703, 580 A.2d at 170.

522. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

523. *Id.* at 21-22; *see Katz v. United States*, 389 U.S. 347, 354-357 (1967). The Court has often recognized that the interest of "officer[s] engaged in the often competitive enterprise of ferreting out crime," differs from the Court's interest in upholding constitutional protections. *Johnson v. United States*, 333 U.S. 10, 14 (1948) (footnote omitted); *see Steagald v. United States*, 451 U.S. 204, 212-13 (1981).

524. *See Terry*, 392 U.S. at 21-22.

525. *See Burkoff, Bad Faith Searches*, 57 N.Y.U.L. REV. 70, 87-88 (1982). Burkoff also suggested that *Terry* applied both an objective inquiry—into the reasonableness of the officer's decision to engage in the search—and a subjective inquiry—into the police officer's actual factual basis for deciding to act. *See id.*

526. Burkoff described as "superobjectivist" an inquiry that ignores the searching of-

their safety, but conduct a search in the hope of finding incriminating evidence, the evidence should be suppressed.<sup>527</sup>

Furthermore, an objective standard that ignores the police officers' subjective intent exceeds the limited exception to the warrant requirement that the Supreme Court established in *Maryland v. Buie*.<sup>528</sup> Before the Supreme Court's decision, the appellate courts reached different results in evaluating the constitutionality of protective sweeps based on less than probable cause.<sup>529</sup> In *Maryland v. Buie*, the Supreme Court made clear that there is a limited exception to the fourth amendment warrant requirement for protective sweeps if the sweeps are based on a reasonable suspicion that the area covered harbors a person who poses a threat to police safety.<sup>530</sup> The Court determined that the Constitution permits this exception because concern for a police officer's safety outweighs any limited infringement on the privacy interests in the home occasioned by the search, particularly because the officers are operating in a hostile environment.<sup>531</sup>

The Supreme Court specifically rejected a bright-line rule allowing a protective sweep whenever police perform an in-home arrest for a violent crime.<sup>532</sup> It recognized that a protective sweep's intrusion into individual privacy was not *de minimis*, and thus should be allowed only when the interest in providing for police safety outweighs the privacy interest injured by the protective sweep.<sup>533</sup> To permit a warrantless search when an arresting police officer has no subjective fear of danger, but a reasonable police officer would have manifested fear based on the facts of the situation, alters the balance struck by the Supreme Court in *Maryland v. Buie*. If the officers do not subjectively fear for their safety, then there is no need to provide for the police protection that is the underlying reason for allowing the protective search. If the rule were other-

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ficer's actual intent in favor of the intent of an objectively reasonable officer. *Id.* at 88. He also raised the concern that this "superobjectivist" approach could result in the presentation of evidence discovered subsequent to the search that the officers were unaware of at the time of the search. *See id.*

527. *See Sibron v. New York*, 392 U.S. 40, 63-65 (1968).

528. *See Buie II*, 320 Md. at 706-07, 580 A.2d at 172 (Adkins, J., dissenting).

529. *See United States v. Jackson*, 778 F.2d 933, 936-37 (2d Cir. 1985) (comparing circuits), *cert. denied*, 479 U.S. 910 (1986); *see also Joseph, The Protective Sweep Doctrine: Protecting Arresting Officers from Attack by Persons Other than the Arrestee*, 33 CATH. U.L. REV. 95, 121-29 (1983); Kelder & Statman, *supra* note 498, at 1006-07 & nn. 99, 101, 105.

530. *See* 110 S. Ct. 1093, 1099-1100 (1990).

531. *See id.* at 1097-98.

532. *See id.* at 1098-99.

533. *See id.* at 1098.

wise, police departments would be free to adopt a policy of performing protective sweeps whenever making in-home arrests for a violent crime because, as the Court pointed out, all in-home arrests by their nature pose a potential threat to police safety.<sup>534</sup> The Supreme Court clearly rejected this result.<sup>535</sup>

It seems improbable that a police officer would testify in court that he or she had no subjective fear of attack.<sup>536</sup> It would be wise, however, to read the Court of Appeals' decision narrowly to avoid improperly broadening the Supreme Court's ruling on protective sweeps. One of the police officers involved in Buie's arrest testified that he was not "worried about there being any danger."<sup>537</sup> Based on this testimony, Buie argued that because the police did not subjectively fear danger from attack, it was unreasonable to conduct the protective search that led to discovery of the incriminating evidence, and ultimately to Buie's conviction.<sup>538</sup> This testimony alone, however, should not result in suppression of the evidence. The court may look at the evidence taken as a whole to determine whether the police officer held a subjective fear of attack.<sup>539</sup> That one officer was unafraid that the area swept harbored someone who posed a danger is not conclusive as to whether the other officers feared an attack. It is conceivable that one or more of the police present feared an assault, and that one of them performed the protective sweep because,

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534. See *id.*; *Steagald v. United States*, 451 U.S. 204, 215 (1981).

535. See 110 S. Ct. at 1099; *Buie*, 320 Md. at 706, 580 A.2d at 172 (Adkins, J., dissenting). It also seems inconsistent that searches based on "inarticulable hunches" would be legal when the police possess no fear whatsoever. See 110 S. Ct. at 1097 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 27 (1967)).

536. This is particularly true if counsel adequately prepares the officer to testify. But see *supra* note 476. In fact, at trial the State attempted to reopen the suppression hearing in order to introduce evidence that the officer who searched the basement possessed a subjective suspicion of fear for his safety, even though the trial judge found for the State on the suppression motion. See *Buie v. State*, 72 Md. App. 562, 567-68, 531 A.2d 1290, 1292-93 (1987). The Court of Special Appeals rejected the State's attempt to introduce evidence in this post hoc manner. See *id.* at 568, 531 A.2d at 1293; *Buie I*, 314 Md. 151, 155 n.2, 550 A.2d 79, 81 n.2 (1987).

537. *Buie II*, 320 Md. at 708, 580 A.2d at 173.

538. See *id.* at 700, 580 A.2d at 169.

539. See *id.* at 703, 580 A.2d at 170. The Court of Appeals pointed out that the question of bad faith was not an issue in this case. See *id.* at 703 n.1, 580 A.2d at 170 n.1. But a subjective/objective test eliminates the possibility of bad faith on the part of police officers. See *id.* at 706, 580 A.2d at 172 (Adkins, J., dissenting). A police officer who testifies that he had no fear of danger, and took no action demonstrating the contrary, clearly has exercised the search in bad faith, notwithstanding the fact that the circumstances might have caused a reasonable officer to fear danger of an attack. See *id.*; see also 3 W. LAFAYE, *supra* note 487, § 9.3(a) at 428 n.34 (a police officer's actions in the heat of the moment are an indication of the officer's subjective belief).

in part, he was worried about an attack.<sup>540</sup> If this is true—the officer testified that he entered the basement “in case there was someone else”<sup>541</sup> down there— then the search was proper and use of the running suit at trial was not unconstitutional.

Read in this manner, *Buie* conforms to the Supreme Court’s ruling regarding protective sweeps, because the search was performed to protect police officer safety. Once it is established that at least one of the officers had a subjective fear of attack, the court must then determine whether that suspicion was objectively reasonable. This test requires the fact finder to determine “whether a reasonably prudent police officer, under those circumstances, is justified in forming a reasonable suspicion that the house is harboring a person posing danger to those on the arrest scene.”<sup>542</sup>

4. *Conclusion.*—In interpreting the reasonable suspicion standard, the Maryland Court of Appeals unnecessarily broadened the protective sweep exception to the warrant requirement by using a purely objective test to judge the sweep’s reasonableness. A rule that does not take into account the subjective intent of the police officers making the arrest goes beyond what the Supreme Court intended when it articulated the exception and the underlying reasons for granting it. Therefore, to best protect the privacy interests granted by the Constitution, and the need to judge police conduct in a neutral and detached manner, a subjective intent that is objectively reasonable should be found before a protective sweep is ruled constitutional. This standard offers a realistic balance between the goal of protecting police safety and preserving individual privacy interests. The *Buie* decision should be read narrowly so that it conforms to this test and is consistent with the Supreme Court’s

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540. See 3 W. LAFAVE, *supra* note 487, § 9.3(a), at 426-27. Police officers are permitted to bring to the analysis their specialized training and experience in law enforcement when making judgments about a particular situation. See *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (police must establish “a particularized and objective basis for suspecting the particular person stopped”).

541. *Maryland v. Buie*, 110 S. Ct. at 1093, 1095 (1990).

542. *Buie II*, 320 Md. at 703, 580 A.2d at 170 (citing 110 S. Ct. at 1099).

underlying rationale in finding constitutional reasonable protective sweeps.

VIRGINIA A. STUELPNAGEL

RACHEL K. O'LEARY

-CAROL A. IANCU

LAWRENCE R. HOLZMAN

CYNTHIA E. RODGERS

KEVIN PASCALE

#### IV. CRIMINAL LAW

##### A. Defendants' Rights to Review State Child Abuse Records

In *State v. Runge*,<sup>1</sup> the Court of Appeals held that a defendant charged with child abuse had no statutory right<sup>2</sup> to review confidential state records relating to the abuse victim.<sup>3</sup> In construing the confidentiality statute, the court examined the statute's language and its legislative history, and determined that its purpose was to permit release of confidential information only in certain circumstances.<sup>4</sup> According to the court, the legislature did not intend to provide an accused child abuser with statutory entitlement to such information.<sup>5</sup>

The Court of Appeals appropriately confined its analysis to interpreting the confidentiality statute, because it was the only authority relied upon by the defendant. It did not decide whether a Maryland defendant is entitled to obtain disclosure of certain records under the sixth amendment's confrontation clause<sup>6</sup> or the Maryland constitution's declaration of rights.<sup>7</sup> Although the Supreme Court has limited the reach of the federal Constitution's confrontation clause,<sup>8</sup> future Maryland defendants should argue for expansion of the right of confrontation under the Maryland constitution.

1. *The Case.*—The Cecil County grand jury indicted William Frederick Runge on three counts of sexually abusing his three children.<sup>9</sup> Prior to trial, he sought production by the Cecil County Department of Social Services (DSS) of "all records in any way relating

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1. 317 Md. 613, 566 A.2d 88 (1989).

2. See MD. ANN. CODE art. 88A, § 6 (Supp. 1989).

3. See 317 Md. at 620, 566 A.2d at 91. On a separate issue, the court also held that the trial court's admonitory remarks to defense counsel did not warrant a mistrial. *Id.* at 625, 566 A.2d at 94.

4. See *id.* at 620, 566 A.2d at 91. The statute makes unauthorized release of child abuse records a criminal offense. See *infra* note 11.

5. See *Runge*, 317 Md. at 620-21, 566 A.2d at 91.

6. The sixth amendment confrontation clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

7. The Maryland constitution provides "[t]hat in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses for and against him on oath . . . ." MD. CONST. DECL. OF RTS. art. 21.

8. See *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (plurality opinion), discussed *infra* notes 68-74 and accompanying text.

9. *Runge*, 317 Md. at 614, 566 A.2d at 88.

to" himself and his family.<sup>10</sup> DSS moved to quash the subpoena, relying, like Runge, on article 88A, section 6(b) of the Maryland code.<sup>11</sup> At a pretrial hearing, the circuit court judge followed the Supreme Court's decision in *Pennsylvania v. Ritchie*,<sup>12</sup> which called for *in camera* review by the trial judge to determine which documents of a confidential file should be disclosed to a defendant.<sup>13</sup> The circuit court reviewed the entire DSS file and read into the record all documents it deemed material to Runge's defense.<sup>14</sup> Additionally, the court ordered the State and DSS to give to the defense, either before trial or at the time the Runge children testified, all of the children's prior statements.<sup>15</sup> The court also ordered immediate release of certain documents to the defense, including copies of all letters written by Runge.<sup>16</sup> The judge stated that by these disclo-

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10. *Id.*

11. See MD. ANN. CODE art. 88A, § 6(b) (Supp. 1989). Subsection (b) provides, in part:

(b) Child abuse or neglect.—Except as otherwise provided in Title 5, Subtitle 7 of the Family Law Article, all records and reports concerning child abuse or neglect are confidential, and their unauthorized disclosure is a criminal offense subject to the penalty set out in subsection (e) of this section. Information contained in reports or records concerning child abuse or neglect may be disclosed only:

(1) Under a court order;

(2) To personnel of local or State departments of social services, law enforcement personnel . . . ;

(3) To local or State officials responsible for the administration of the child protective service as necessary to carry out their official functions;

(4) To a person who is the alleged child abuser . . . if that person is responsible for the child's welfare and provisions are made for the protection of the identity of the reporter or any other person whose life or safety is likely to be endangered by disclosing the information;

(5) To a licensed practitioner who . . . is providing treatment or care to a child who is the subject of a report of child abuse or neglect; or

(6) To a parent or other person who has permanent or temporary care and custody of a child, if provisions are made for the protection of the identity of the reporter or any other person whose life or safety is likely to be endangered by disclosing the information.

*Id.*

The state also relied on a Maryland law that prohibits the disclosure of certain public records. See Brief and Appendix of Petitioner at 3, *State v. Runge*, 317 Md. 613, 566 A.2d 88 (1989) (No. 89-28); MD. STATE GOV'T CODE ANN. § 10-616(c) (1984) ("A custodian shall deny inspection of public records that relate to welfare for an individual.").

12. 480 U.S. 39 (1987) (plurality opinion). See *infra* notes 68-74 and accompanying text.

13. See *id.* at 58.

14. See *Runge*, 317 Md. at 615, 566 A.2d at 88.

15. See *id.*

16. See *id.*, 566 A.2d at 88-89. The information disclosed pursuant to the order pertained to DSS's recent and past contacts with the Runge family. These related to the incidents of abuse that ultimately resulted in the charges against the defendant in this

tures, the defense "got just about the whole record, if not all the record."<sup>17</sup>

A jury convicted Runge on all three counts of child abuse, and the court sentenced him to three concurrent fifteen-year prison terms.<sup>18</sup> He appealed the decision and argued before the Court of Special Appeals that *Ritchie* did not control.<sup>19</sup> Runge distinguished *Ritchie* by pointing out that the Pennsylvania disclosure statute at issue in that case did not provide for disclosure to the alleged child abuser, as the Maryland statute does.<sup>20</sup> The Court of Special Appeals accepted Runge's argument and reversed his convictions, holding that the Maryland statute mandates disclosure of the records.<sup>21</sup>

The Court of Appeals granted the State's petition for certiorari to interpret the Maryland statute.<sup>22</sup> Before the court, Runge relied solely on the statute as the basis for his claim that he was entitled to full disclosure of the DSS file.<sup>23</sup> The court therefore confined its

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case, and to prior allegations of child neglect. Brief and Appendix of Petitioner at 4, *State v. Runge*, 317 Md. 613, 566 A.2d 88 (1989) (No. 89-28).

17. *Runge*, 317 Md. at 615, 566 A.2d at 89.

18. *Id.* at 614, 566 A.2d at 88.

19. See *Runge v. State*, 78 Md. App. 23, 29, 552 A.2d 560, 564, *rev'd* 317 Md. 613, 566 A.2d 88 (1989).

20. See *id.* At the time of the *Ritchie* trial, the Pennsylvania statute authorized disclosure of confidential child abuse records only to an authorized official of a child protective agency, a physician treating the child, the child's guardian ad litem, or a court of competent jurisdiction pursuant to court order. See PA. STAT. ANN. tit. 11, § 2215 (Purdon Supp. 1975).

The defendant in *Runge* argued that because § 6(b)(4) permits disclosure to an alleged child abuser, the court's *in camera* review of the file should have been limited to protecting from disclosure the identities of the reporters of abuse. See *Runge*, 78 Md. App. at 29, 552 A.2d at 564; MD. CODE. ANN. art. 88A, § 6(b) (Supp. 1989).

21. See *Runge*, 78 Md. App. at 34-35, 552 A.2d at 566-67. The court made two observations. First, the statute's terms do not explicitly require or permit a court to screen the requested files beyond what is necessary to protect the reporters of the information. *Id.* at 33-34, 552 A.2d at 566. Second, the use of "may" in subsection (b)'s opening paragraph does not automatically mean that disclosure is discretionary. The context of the statute in which the word "may" is used may require that it be interpreted as mandatory. *Id.* at 34, 552 A.2d at 566. The cases cited by the court, however, do not support that assertion, because they use the word "shall." See, e.g., *Resetar v. State Bd. of Educ.*, 284 Md. 537, 547-50, 399 A.2d 225, 230-32, *cert. denied*, 444 U.S. 838 (1979) (failure to observe a rule that the "Board shall . . . render a decision . . . within thirty (30) days . . ." did not strip the Board of authority to discipline a teacher where the rule did not provide a penalty in the event of a rule violation); *Blumenthal v. Clerk of Circuit Court for Anne Arundel County*, 278 Md. 398, 408, 365 A.2d 279, 285-86 (1976) (new statute subsection softened the mandatory tone of prior subsections that contained the word "shall").

22. See *State v. Runge*, 316 Md. 258, 558 A.2d 390 (1989) (*cert. granted*).

23. See *Runge*, 317 Md. at 615-16, 566 A.2d at 89.



analysis to interpreting the statute and did not discuss the Maryland rules of discovery or the disclosure principles established by United States Supreme Court cases.<sup>24</sup> Using the statute's legislative history, the court determined that the legislature designed the law to prevent wrongful disclosure of child abuse records.<sup>25</sup> Under the court's interpretation, the statute provides custodians of child abuse records with discretion to release records only in defined circumstances, but with immunity from prosecution for authorized releases.<sup>26</sup> The Court of Appeals thus held that the trial court correctly rejected Runge's claim of entitlement to the records under section 6(b).<sup>27</sup>

## 2. *Legal Background.*—

a. *Child Abuse Legislation.*—Until recently, child abuse and neglect were hidden problems—known to exist, but rarely acknowledged.<sup>28</sup> As society's awareness of child abuse increased, so did the states' efforts to reform their child protection systems.<sup>29</sup> Congress expressed its concern by passing the Child Abuse Prevention and Treatment Act<sup>30</sup> (Child Abuse Act) in 1974. The Child Abuse Act set forth the criteria for states' eligibility for federal grants to improve their child abuse services.<sup>31</sup> As part of the effort to conform with the federal scheme, most states have enacted provisions to preserve the confidentiality of child abuse records and protect the identities of those who report child abuse.<sup>32</sup>

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24. See *id.* at 616, 566 A.2d at 89.

25. See *id.* at 620, 566 A.2d at 91.

26. See *id.*

27. See *id.*

28. See Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 458 (1978) (examining the "second generation" of state child protection laws enacted after the federal Child Abuse Prevention and Treatment Act).

29. *Id.* at 459.

30. Act of Jan. 31, 1974, Pub. L. No. 93-247, 88 Stat. 5 (codified at 42 U.S.C. §§ 5101-5106 (Supp. V 1975)).

31. See 42 U.S.C. § 5106a(b) (Supp. V 1975).

32. Section 5103(b)(4) requires states to enact confidentiality measures as a requisite of grant eligibility. "[A State shall] . . . provide for methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians . . . ." *Id.* § 5103(b)(4).

Under the regulations implementing the Child Abuse Act, a state "must provide by statute that all records concerning reports and reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal offense." 45 C.F.R. § 1340.14(i)(1) (1989). For examples of typical state confidentiality statutes, see CAL. PENAL CODE § 11167.5 (West Supp. 1990); COLO. REV. STAT. § 19-3-314 (Supp. 1989); ILL. ANN. STAT. ch. 23, para. 2061.1 (Smith-Hurd Supp. 1990); MICH. COMP. LAWS ANN. § 722.627 (West Supp. 1990); TENN. CODE ANN. § 37-1-409 (Supp. 1990).

A 1983 Maryland act<sup>33</sup> reflects the State's desire to conform with federal mandates, and to protect neglected and abused children.<sup>34</sup> By introducing the Child Protection Bill in the 1983 legislative session, Delegate Sheila Hixson sought to provide additional statutory protection for abused children.<sup>35</sup> One of the proposed changes to existing law was in the area of confidentiality.<sup>36</sup> The statutes existing in 1983 conferred confidentiality only on information relating to applicants for or recipients of social services.<sup>37</sup> Thus, a child abuse victim's records were not confidential unless the victim had already applied for social services or was receiving services at the time. Delegate Hixson urged the extension of confidentiality to cover all abuse victims.<sup>38</sup> In response to subsequent concerns about an alleged abuser's right to receive notice that a report had been made,<sup>39</sup> she proposed an exception to the provision that made disclosure criminal—the release of records “[t]o a person who is the alleged child abuser or the person who is suspected of child neglect.”<sup>40</sup> A modified version of this proposal later became section 6(b)(4).<sup>41</sup>

Thus, section 6(b)(4)'s original aim was to allow for notice to the alleged abuser. The most significant aspect of a confidentiality statute such as Maryland's, however, appears to be its effect on pre-trial discovery of child abuse records and reports when the alleged abuser becomes a defendant in criminal proceedings. Any defend-

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33. Act of May 24, 1983, ch. 492, §§ 2, 3, 1983 Md. Laws 1500, 1502-03.

34. *Runge*, 317 Md. at 619, 566 A.2d at 90-91.

35. See Hearing on H.B. 1395—Child Protection before the House Judiciary Committee, 1983 Sess., Mar. 19, 1983 (testimony of Delegate Sheila Hixson).

36. See *id.* Another proposed change was to expand the existing neglect and abuse statutes to include children who are in potential danger of neglect and abuse. *Id.*

37. See *id.*

38. See *id.*

39. One commentator has stated that “[a]s a matter of fundamental fairness, if not constitutional right,” accused abusers have a right to know what information a government agency is keeping about them. See Besharov, *supra* note 28, at 510. Only when alleged abusers know what is in the records can they pursue their rights to amend the record or remove it from the agency's files. *Id.* at 510-11.

40. See Memorandum and attachment from Delegate Sheila Hixson to the Hon. Joseph E. Owens, Chairman, House Judiciary Committee (Mar. 23, 1983) (proposed amendment to H.B. 1395) (legislative file of Md. H.B. 1395, 1983 Sess.).

41. The Department of Human Resources (DHR) proposed the current language of article 88A, § 6(b)(4) after expressing reservations about the scope of Delegate Hixson's proposed amendment. Letter from Joy Duva, Dep't of Human Resources, to the Hon. Joseph E. Owens, Chairman, House Judiciary Committee (Mar. 29, 1983) (legislative file of Md. H.B. 1395, 1983 Sess.). DHR was concerned that providing access to records to an alleged abuser who was not related to the child victim would endanger the victim and his or her family. See *id.*

ant has a legitimate interest in obtaining information that may help impeach the testimony of the victim and other witnesses.<sup>42</sup> Denying access to this information could impair the defendant's ability to conduct cross-examination, which is a right secured by the sixth amendment's confrontation clause.<sup>43</sup> Thus, a conflict about whether a statute permits or mandates disclosure of child abuse records necessarily implicates confrontation issues.

*b. The Right of Confrontation.—*

(1) *In general.*—Two significant purposes lie at the core of the right of confrontation.<sup>44</sup> One is to give the judge and jury opportunities to observe a testifying witness's comportment.<sup>45</sup> The ability to observe is seen as an aid to evaluating the witness's credibility.<sup>46</sup> The other purpose is "*to secure for the opponent the opportunity of cross-examination.*"<sup>47</sup> The Supreme Court has emphasized this purpose, stating that the most significant guaranty of the right of confrontation is an "adequate opportunity for cross-examination."<sup>48</sup>

Maryland's state constitution, adopted in 1776, recognized a defendant's right to confrontation even before the sixth amendment was drafted.<sup>49</sup> Maryland courts have stated that this right includes the accused's right to be seen by his accuser when the accuser is testifying,<sup>50</sup> as well as the right to cross-examine opposing

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42. See, e.g., *Jencks v. United States*, 353 U.S. 657, 667 (1957) (impeachment of testimony was "singularly important" to the defendant).

43. See generally *infra* notes 44-67 and accompanying text.

44. The right of confrontation guarantees the defendant the right to be present at his or her trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *Lewis v. United States*, 146 U.S. 370, 372-73 (1892). But the right to be present at trial may be lost by consent. *Taylor v. United States*, 414 U.S. 17, 20 (1973) (the defendant waived his right to be present by voluntarily absenting himself from trial). The defendant's misconduct may also result in loss of the right. *Allen*, 397 U.S. at 346 (the defendant's persistently disruptive behavior at trial caused him to lose his right to be present for the remainder of the proceedings).

45. 5 J. WIGMORE, EVIDENCE § 1395, at 153 (J. Chadbourn rev. 1974).

46. *Id.*

47. *Id.* at 150 (emphasis in original).

48. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). The history of the right of confrontation is not clear. For a treatment of how the right became part of English common law, see *Gregory v. State*, 40 Md. App. 297, 306 n.6, 391 A.2d 437, 443 n.6 (1978).

49. See MD. CONST. DECL. OF RTS. art. 21. See *supra* note 7 for the text of article 21. The sixth amendment was made applicable to the states through the fourteenth amendment in *Pointer v. Texas*, 380 U.S. 400, 403-06 (1965).

50. See *Wildermuth v. State*, 310 Md. 496, 512-13, 530 A.2d 275, 283 (1987); see also *Dutton v. State*, 123 Md. 373, 389, 91 A. 417, 424 (1914) ("living witnesses . . . are required to be produced in court, confronted with the accused, and deliver their testimony under the sanction of an oath . . ."); *Johns v. State*, 55 Md. 350, 360 (1881) (one

witnesses.<sup>51</sup>

Cases arising under the confrontation clause generally fall into two broad categories: "cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination."<sup>52</sup> The introduction of hearsay evidence often characterizes cases of the first category. The confrontation clause limits the prosecution's ability to use as evidence statements of persons who do not testify at trial and therefore cannot be cross-examined.<sup>53</sup> The Supreme Court has formulated a two-part inquiry to test hearsay's admissibility under the confrontation clause. First, the prosecution must establish that the hearsay declarant is unavailable to testify at trial; if the witness is available, the prosecution must produce her at trial so the defense can cross-examine her.<sup>54</sup> After a showing of unavailability, the

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purpose served by cross-examination is that the witness may observe the defendant and discover that she had made a mistake in the identity of the party committing the crime). In *Wildermuth*, the court discussed how physical confrontation satisfies the confrontation clause's main purpose—to find the truth:

This requirement supports the truth-seeking function of confrontation because it tends to impress upon the witness the seriousness and solemnity of the occasion, and as a consequence, the necessity for truthful testimony. The need for truthfulness is further enhanced by the witness's awareness that the accused has personal knowledge of the facts bearing on his or her involvement in the offense charged.

*Wildermuth*, 310 Md. at 513, 530 A.2d at 283.

51. See *State v. Collins*, 265 Md. 70, 76, 288 A.2d 163, 166 (1972) (the right to confront accusers is grounded in the belief that an individual should have the opportunity to cross-examine the accusers); see also *Franklin v. State*, 239 Md. 645, 647-48, 212 A.2d 279, 281 (1965) (although the right to cross-examine is inherent in the right of confrontation, it cannot override a witness's right to refuse to testify on the basis of self-incrimination).

52. *Delaware v. Fensterer*, 474 U.S. 15, 18 (1985) (per curiam). *Fensterer* itself did not fall into either category. See *id.* at 19. The defendant alleged that his right to confrontation was violated when during his cross-examination of an expert witness, the witness could not recall the scientific tests on which he had based his conclusion. See *id.* at 17. The Court rejected the defendant's claim after determining that the witness's memory loss was demonstrated in front of the jury and that the defense had impeached the witness's testimony with its own expert witness's testimony. See *id.* at 20-22.

53. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Such statements ordinarily constitute hearsay, but they may be admissible if they fall within a recognized hearsay exception. *Id.* The Supreme Court has stressed, however, that the key issue under the confrontation clause is not compliance with hearsay rules, but rather assurance that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." *California v. Green*, 399 U.S. 149, 161 (1970).

54. *Roberts*, 448 U.S. at 65. See *Barber v. Page*, 390 U.S. 719 (1968). In *Barber*, a key witness was in federal prison at the time of the defendant's trial. At a pretrial hearing in the presence of the defendant and his lawyer, the witness gave testimony that was subject to cross-examination. The State introduced a transcript of the testimony as evidence at the trial, arguing that the witness was unavailable to testify at trial. *Id.* at 720.

statement is admissible only if it bears sufficient indicia of reliability.<sup>55</sup> Applying this standard, the Court has held admissible testimony from a prior trial that was subject to cross-examination,<sup>56</sup> as well as preliminary hearing testimony when the defense counsel's cross-examination at that hearing was not "significantly limited in any way."<sup>57</sup>

In the second category of cases, statutory or judicial restrictions on the scope of cross-examination are challenged as violations of the defendant's right of confrontation. The confrontation clause ensures that a defendant has sufficient leeway in cross-examining the government's witnesses.<sup>58</sup> The Supreme Court has found, for example, a constitutional violation when a trial court prohibited a

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The Court recognized that the confrontation clause has not been violated when prior testimony has been subject to cross-examination and the witness is unavailable for testifying at trial. *Id.* at 722. In reversing the defendant's conviction, however, the Court held that "a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Id.* at 724-25. The State should have sought the cooperation of the federal prison officials in getting the witness to the trial. *See also* Mancusi v. Stubbs, 408 U.S. 204, 212-13 (1972) (the declarant's permanent transfer to a foreign country constituted sufficient unavailability where there was no established means of compelling his appearance). *But see* Dutton v. Evans, 400 U.S. 74 (1970) (plurality opinion). In *Dutton*, the Court did not require a showing of unavailability after determining that it was "remote" that the defendant would benefit from being able to cross-examine the declarant about the truth of his statement. *Id.* at 89.

55. *Roberts*, 448 U.S. at 65-66.

56. *See Mancusi*, 408 U.S. at 216.

57. *See* California v. Green, 399 U.S. 149, 166 (1970). *See also* Pointer v. Texas, 380 U.S. 400 (1965). In *Pointer*, the defendant was arrested for robbery and brought before a judge for a hearing. At the hearing, an assistant district attorney presented the victim as the prosecution's chief witness, but the defendant, who did not have counsel, did not conduct cross-examination. After indictment and before trial, the victim moved out of state. At trial, the State offered a transcript of the witness's prior testimony as evidence against the defendant, who had since obtained a lawyer. *Id.* at 401. Over the lawyer's objections, the evidence was admitted and the defendant was convicted. The Supreme Court held that the defendant did not have the opportunity, through counsel, to adequately cross-examine the witness at the preliminary hearing, and reversed the conviction. *Id.* at 407-08.

Maryland courts have decided similar cases. The defendant in *State v. Collins*, 265 Md. 70, 288 A.2d 163 (1972), was mailed notice of the scheduled deposition of a witness, but he was out of town and did not receive the notice until after the deposition. His attorney, who was present, objected to the proceedings because of his client's absence, but proceeded to cross-examine the witness. *See id.* at 74, 288 A.2d at 166. Seeking to have the witness's testimony admitted into evidence, the State argued that the confrontation requirements were satisfied by the service of notice and the attorney's presence. *See id.* at 79, 288 A.2d at 168. The Court of Appeals, however, held that the defendant's right to be present at the deposition could not be waived by his attorney's presence. *See id.* at 80-81, 288 A.2d at 169.

58. *See, e.g.,* Davis v. Alaska, 415 U.S. 308, 316 (1974) ("[T]he cross-examiner is not only permitted to . . . test the witness' perceptions and memory, [but also] . . . to impeach . . . the witness.").

defendant from asking the principal prosecution witness for his correct name and address.<sup>59</sup> Also, the Court has held that a trial judge erred in denying defense counsel the opportunity to raise the issue of a key witness's juvenile probationary status.<sup>60</sup>

The Supreme Court has recently attempted to draw a distinction between pretrial and trial restrictions on the scope of cross-examination<sup>61</sup> and has stated that the right of confrontation is a *trial* right.<sup>62</sup> But in prior cases, the Court has held that events occurring outside of trial may impair cross-examination,<sup>63</sup> and therefore, it was constitutional error to deny access to material that would aid in questioning a prosecution's witness<sup>64</sup> and to exclude defense counsel from a pretrial identification lineup.<sup>65</sup>

The Court has also attempted to settle whether the confronta-

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59. See *Smith v. Illinois*, 390 U.S. 129, 131 (1968); see also *Alford v. United States*, 282 U.S. 687, 693 (1931) (the trial court erred in disallowing an inquiry into a witness's place of residence when such a question was appropriate in placing the witness in his proper setting).

60. See *Davis*, 415 U.S. at 320. The trial court in *Davis* prohibited the defendant from questioning a witness about the latter's juvenile criminal record because a statute made that information confidential. Defendant's counsel wanted to argue that the witness, who was on probation, was assisting the police out of fear that his probation would be revoked. See *id.* at 311. The Supreme Court held that the restriction on cross-examination violated the confrontation clause by interfering with the defendant's ability to impeach the witness's testimony. See *id.* at 320.

*Brown v. State*, 74 Md. App. 414, 538 A.2d 317 (1988), is an example of a court-imposed restriction in Maryland. The State's sole witness in *Brown* had been arrested on charges unrelated to those involving the defendants. *Id.* at 516, 538 A.2d at 318. After cooperating with the police by giving information about the defendants' alleged criminal activities, the charges against the witness were not prosecuted. *Id.* at 417, 538 A.2d at 318. The trial judge prohibited the defense counsel from questioning the witness about her arrest or the circumstances surrounding her statements to the police. *Id.*, 538 A.2d at 319. The defendants were convicted. On appeal, the Court of Special Appeals stated that a trial court may exercise its discretion to control the limits of cross-examination only after "the constitutionally required threshold level of inquiry has been afforded the defendant." *Id.* at 419, 538 A.2d at 319 (citing *United States v. Christian*, 786 F.2d 203, 213 (6th Cir. 1986)). The court emphasized that cross-examination to test the witness's credibility is especially important when the State's case rests exclusively on that witness's testimony. See *id.* at 421, 538 A.2d at 320. In this instance, the trial court's ruling impeded the defendants' cross-examination and was a violation of their rights of confrontation. See also *Lewis v. State*, 71 Md. App. 402, 415, 526 A.2d 66, 72 (1987) (right of confrontation was violated when the trial court imposed a time limit on the defendant's cross-examination).

61. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 n.9 (1987) (plurality opinion) (confrontation clause protects trial rights and does not compel pretrial production of information that might be useful in preparing for trial).

62. See *id.* at 52. See *infra* note 90 and accompanying text.

63. See, e.g., *Jencks v. United States*, 353 U.S. 657, 668-69 (1957).

64. *Id.*

65. *United States v. Wade*, 388 U.S. 218, 227 (1967).

tion clause guarantees effective cross-examination or merely the opportunity for effective cross-examination. Recent decisions have supported the latter conclusion: the clause guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."<sup>66</sup> The need for an inquiry into the effectiveness of cross-examination however, has been strongly implied on other occasions.<sup>67</sup>

(2) *Child abuse cases.*—The Supreme Court first considered the accused child abuser's right of confrontation in *Pennsylvania v. Ritchie*, a case involving facts similar to those in *Runge*. The defendant was accused of sexually abusing his thirteen-year-old daughter.<sup>68</sup> While preparing his defense, Ritchie subpoenaed Children and Youth Services (CYS), seeking access to the agency's file on his daughter's case.<sup>69</sup> CYS denied Ritchie access to the file, claiming that it was privileged under a statute that makes all CYS reports confidential, with certain exceptions.<sup>70</sup> The trial court later convicted Ritchie of incest, rape, and other charges, but the Pennsylvania appellate courts vacated the conviction and remanded the case after determining that Ritchie's right of confrontation had been violated.<sup>71</sup>

The majority of the Supreme Court in *Ritchie* agreed with the Pennsylvania Supreme Court that the defendant was entitled to know whether relevant information existed in the CYS file.<sup>72</sup> Four

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66. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis in original). See also *Ritchie*, 480 U.S. at 53 (quoting *Fensterer*); *Ohio v. Roberts*, 448 U.S. 56, 73 n.12 (1980) ("in all but . . . extraordinary cases, no inquiry into 'effectiveness' is required").

67. See *Davis v. Alaska*, 415 U.S. 308, 318 (1974) ("Petitioner was thus denied the right of effective cross-examination"); *Smith v. Illinois*, 390 U.S. 129, 131 (1968). Defense counsel in *Smith* asked the witness to state his correct name and address, but the trial court sustained the prosecutor's objection to the question. See *id.* at 130-31. The Supreme Court determined that "[t]o forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." *Id.* at 131. See also *Ritchie*, 480 U.S. at 61 (Blackmun, J., concurring).

68. 480 U.S. 39, 43 (1987) (plurality opinion).

69. *Id.* CYS is a protective service agency established by the Commonwealth of Pennsylvania to investigate cases of suspected child abuse and neglect. *Id.*

70. *Id.* See *supra* note 20.

71. 480 U.S. at 45-46. The Commonwealth argued that nondisclosure of the file to the defendant was harmless because the trial judge had examined the file and concluded that it contained no information relevant to Ritchie's defense. The Supreme Court of Pennsylvania, however, determined that the defendant was entitled to have the file reviewed by his advocate, who may see relevance where a trial judge would not. *Id.* at 46.

72. See *id.* at 58. Justice Powell's opinion for the Court was joined in full by Chief Justice Rehnquist and Justices White and O'Connor. See *id.* at 42. Justice Blackmun joined in all of the opinion except for the confrontation clause discussion. See *id.* at 61

of the five justices making up the majority, however, disagreed with the Pennsylvania court's decision that Ritchie's access to the file was guaranteed by his right of confrontation.<sup>73</sup> The Court instead used a due process analysis, holding that relevant information in the file must be disclosed to the defendant when it is material to his defense.<sup>74</sup>

### 3. Analysis.—

a. *The Defendant's Statutory Right to the Child Abuse File—The Interpretation of Article 88A, Section 6(b).*—In *Runge*, the Court of Appeals did not address the confrontation clause or the disclosure issues discussed in *Ritchie* and other Supreme Court cases, because the defendant relied solely on article 88A, section 6 in claiming he was entitled to full access to DSS's files.<sup>75</sup> Thus, the problem before the court was one of statutory construction, and in reversing the Court of Special Appeals, the court stated that the lower appellate court had not sufficiently explored the statute's legislative history and purpose.<sup>76</sup>

Article 88A, section 6 makes disclosure of certain public assistance records a criminal offense, but defines several exceptions for disclosure of child abuse records.<sup>77</sup> The main issue before the Court of Appeals was whether disclosure under these exceptions was discretionary or mandatory. The pertinent sentence of subsection (b) provided: "Information contained in reports or records

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(Blackmun, J., concurring). Blackmun nevertheless joined in the Court's judgment, because he felt that the due process analysis outlined by Justice Powell was sufficient to protect the confrontation right. See *id.* at 65 (Blackmun, J. concurring).

73. See *id.* at 54.

74. See *id.* at 56-58. The plurality relied on *Brady v. Maryland*, 373 U.S. 83, 90-91 (1963), in which the Court imposed on the government a due process obligation to provide evidence in its possession that is favorable to the accused and material to the accused's guilt or punishment.

Maryland courts have gone even further. Under *Carr v. State*, 284 Md. 455, 397 A.2d 606 (1979), a criminal defendant is entitled, upon request at the conclusion of the witness's direct testimony, to any prior statements of the witness for use in cross-examination. In *Carr*, the Court of Appeals reversed the defendant's armed robbery conviction when the state denied defense counsel access to a key witness's prior signed statement that was inconsistent with the witness's testimony at trial. See *id.* at 472-73, 397 A.2d at 614. The court held that the state denied Carr due process of law. See *id.* See also *Leonard v. State*, 46 Md. App. 631, 421 A.2d 85 (1979), *aff'd*, 290 Md. 295, 429 A.2d 538 (1981). "[I]t is incumbent upon the court . . . to permit [defense] counsel to inspect the statement and determine for himself whether it is or is not usable for cross-examination." *Id.* at 639, 421 A.2d at 89.

75. See *Runge*, 317 Md. at 615-16, 566 A.2d at 89.

76. See *id.* at 616, 566 A.2d at 89.

77. See MD. CODE ANN. art. 88A, § 6 (Supp. 1989).



concerning child abuse or neglect *may* be disclosed only: . . . ”<sup>78</sup> To interpret the meaning of this language, the court first looked to the statute’s legislative history.<sup>79</sup> The court found that the legislation’s initial purpose was to conform Maryland’s existing statute to the federal law, making the state eligible for federal grants.<sup>80</sup> The court observed that in light of this purpose and the general societal goal of protecting the confidentiality of those who report abuse, subsection (b) could not be read as mandating disclosure of child abuse files to accused child abusers.<sup>81</sup> The statute is merely permissive, protecting records custodians from criminal prosecution for disclosures made under defined circumstances.<sup>82</sup> In discussing the law’s affirmative purpose, the Court of Appeals emphasized that the statute was not intended to grant additional discovery rights to criminal defendants.<sup>83</sup> Runge’s claim that he was entitled to disclosure of the DSS files under section 6(b) could not succeed.

In a technical sense, the Court of Appeal’s decision is unassailable. The court proposed only to construe correctly the statute at issue, and it appears to have succeeded. The Court of Special Appeals stretched the rules of statutory construction too far in ruling that the word “may” in section 6(b) actually meant “shall” and mandated disclosure of records to the defendant.<sup>84</sup> This is not to say that “may” can never have a mandatory meaning. The verb’s form

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78. *Id.* § 6(b) (emphasis added).

79. The Court of Appeals approved the intermediate appellate court’s consideration of the statute’s plain language in light of its purpose. *See id.* at 616, 566 A.2d at 89 (citing *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513, 525 A.2d 560, 566 (1987)). The court determined, however, that the Court of Special Appeals did not give adequate attention to the statute’s legislative history and purpose. *See id.*

80. *See Runge*, 317 Md. at 619, 566 A.2d at 90-91. *See supra* notes 30-32 and accompanying text. The Court of Special Appeals acknowledged this purpose in *Freed v. Worcester County Dep’t of Social Servs.*, 69 Md. App. 447, 518 A.2d 159, *cert. denied*, 309 Md. 47, 522 A.2d 392 (1986), *appeal dismissed*, 484 U.S. 804 (1987). *Freed* held that article 88A, section 6(b) does not provide for disclosure of the identity of a reporter of child neglect to the suspects, who alleged that the complaint was made in bad faith. *See id.* at 453-54, 518 A.2d at 162.

81. *See Runge*, 317 Md. at 620, 566 A.2d at 91.

82. *Id.*

83. *See id.*

84. Indeed, the intermediate appeals court’s decision in *Runge v. State* is particularly unusual in light of that court’s statement in another case that “the statute was never intended to be a vehicle to permit the willy-nilly disclosure of the very records the Legislature sought to keep confidential.” *Freed*, 69 Md. App. at 454, 518 A.2d at 162. The Court of Special Appeals acknowledged that the statute’s purpose was to encourage the reporting of child neglect and stated that “[w]ere we to allow a court to order disclosure merely upon demand or upon the parent’s or guardian’s belief that the disclosure was made in bad faith, the nondisclosure statutes would be severely eroded, if not effectively eliminated.” *Id.* at 454-55, 518 A.2d at 162-63.

is not the sole determinant of whether a statute is mandatory or directory.<sup>85</sup> Courts, however, "will apply that construction which best carries into effect the purpose of the statute under consideration in order to determine whether the statute is mandatory or directory."<sup>86</sup> By strongly emphasizing the statute's legislative history in addition to looking at its plain language, the Court of Appeals correctly applied the rules of statutory construction and arrived at the only logical result.

*b. The Defendant's Constitutional Right to the Child Abuse File—The Right of Confrontation.*—Runge claimed only a statutory right to DSS's records; he did not claim he was entitled to the file based on his right of confrontation.<sup>87</sup> Accordingly, the Court of Appeals did not address any constitutional questions implicated by the case.<sup>88</sup> Future defendants may, however, be able to gain access to child abuse records under a right-of-confrontation argument. These defendants could argue that the court should expand the right of confrontation under article 21 of the Maryland constitution by adopting Justice Brennan's position in his *Ritchie* dissent.<sup>89</sup>

Confrontation clause issues do not arise only at the trial stage.<sup>90</sup>

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85. N. SINGER, SUTHERLAND, STATUTORY CONSTRUCTION § 57.03 (Sands 4th ed. 1984) (other considerations can overcome the natural connotation of the verb's form).

86. *Id.* § 57.04. Sutherland also suggests considering the effects of alternative constructions. *See id.* § 57.07. Section 6(b)'s legislative history makes clear that one of the laws' purposes is to encourage reporting of abuse and neglect. If disclosure of DSS's files to suspected abusers was mandatory, as opposed to directory, potential reporters would likely fear retaliation and thus be discouraged from reporting the abuse they observed. *See also* Kaczorowski v. City of Baltimore, 309 Md. 505, 515, 525 A.2d 628, 632 (1987) (when construing a statute, courts must consider persuasive evidence that includes a bill's title and function paragraphs, and amendments and their relationship to earlier and subsequent legislation).

87. *See* Runge v. State, 78 Md. App. 23, 552 A.2d 560 (1989). The defendant argued to the Court of Special Appeals that the trial court's application of *Pennsylvania v. Ritchie* was erroneous. *See id.* at 29, 552 A.2d at 563-64. Because of significant differences between the confidentiality statutes in Pennsylvania and Maryland, the court's *in camera* inspection should not have included determining which parts of the file were relevant to Runge's defense. Rather, it should have been limited to "safeguarding from disclosure the identity of the reporter(s) of the abuse." *Id.*, 552 A.2d at 564.

88. *See* Runge, 317 Md. at 615-16, 566 A.2d at 89.

89. *See* *Pennsylvania v. Ritchie*, 480 U.S. 39, 66-72 (1987) (Brennan, J., dissenting).

90. *Id.* at 52. Justice Powell cited two Supreme Court cases as support for the statement that the right of confrontation is only a trial right. *See id.* at 52-53; *California v. Green*, 399 U.S. 149, 157 (1970) ("it is this literal right to 'confront' the witnesses at the time of trial that forms the core of the values furthered by the Confrontation Clause"); *Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right."). As Justice Brennan pointed out in dissent, however, neither statement was a response to the question of whether the right of confrontation is implicated by events outside of trial. *Ritchie*, 480 U.S. at 67 (Brennan, J., dissenting).

Maryland courts should recognize that a defendant's ability to cross-examine an adverse witness can be affected by events occurring both before and during trial. Pretrial events, such as denial of access to certain relevant documents, can affect the scope of cross-examination at trial.<sup>91</sup> Moreover, an argument can be made that the right of confrontation demands an analysis of the effectiveness of a defendant's cross-examination, not just an inquiry into whether the defendant had an opportunity for cross-examination. To ignore the effects of pretrial events or to limit the right strictly to an opportunity for cross-examination could render the confrontation clause an "empty formality."<sup>92</sup>

In *Davis v. Alaska*,<sup>93</sup> the trial court, pursuant to a state statute, issued a pretrial protective order prohibiting any reference to a key prosecuting witness's juvenile record.<sup>94</sup> Because of this prohibition, the defense counsel could not adequately demonstrate to the jury the witness's source of bias.<sup>95</sup> The Supreme Court concluded that the jurors were entitled to have the defense theory presented to them so that they could better judge the weight to give the witness's testimony.<sup>96</sup> The decision in *Davis* demonstrates that the distinction between pretrial and trial events is suspect because pretrial events can restrict the ability to cross-examine as much as an event during trial. Yet, the Court in *Ritchie* stated that the defendant's need for pretrial access to information that may help impeach a witness could not entitle the defendant to see the records;<sup>97</sup> *Ritchie*'s sixth amendment rights would have been violated by a court-imposed restriction at trial, not by a pretrial denial of access to CYS's files.<sup>98</sup> But as Justice Blackmun observed in his concurring opinion: "[a] State [cannot] avoid Confrontation Clause problems simply by deciding

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91. Denying access to material that would serve as the basis for effective questioning of an adverse witness is such an event because it would hinder defense counsel's ability to pursue certain lines of inquiry at trial. Thus, pretrial denial of access to material information effectively restricts a defense lawyer as much as a trial court's ruling. See *infra* notes 92-99 and accompanying text. See also *United States v. Wade*, 388 U.S. 218, 227 (1967) (presence of counsel at pretrial identification lineup allows a defendant meaningful cross-examination of witnesses against him and ensures a fair trial).

92. *Ritchie*, 480 U.S. at 62 (Blackmun, J., concurring).

93. 415 U.S. 308 (1974).

94. *Id.* at 311.

95. *Id.* at 318.

96. See *id.* at 317. The Court emphasized that defense counsel, because of the pretrial order, was unable to gather evidence "from which to argue *why* [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." *Id.* at 318 (emphasis in original).

97. See 480 U.S. at 52 (plurality opinion).

98. *Id.* at 53-54.

to hinder the defendant's right to effective cross-examination, on the basis of a desire to protect the confidentiality interests of a particular class of individuals, at the pretrial, rather than at the trial, stage."<sup>99</sup>

In *Runge*, the trial court's refusal to grant the defendant access to the DSS files was highly prejudicial to the defendant. Even though the defendant received most of the file after the court's *in camera* inspection, he did not receive the children's statements contained in the file until halfway through the second day of the three-day trial.<sup>100</sup> This limited the cross examination's potential scope, preventing defense counsel from using the children's prior inconsistent statements, or any other information that may have been in the file, to impeach the children's testimony. With no specific facts on which the defendant's attorney could base his questions, the jury may have thought that he was attacking the witnesses' credibility without justification.<sup>101</sup>

The right of confrontation should encompass effective cross-examination, not just an opportunity for cross-examination. The Supreme Court has stated that the confrontation clause protects the right to cross examination, and is designed to promote reliability in the truth-finding process.<sup>102</sup> Professor Wigmore called cross-examination the "greatest legal engine ever invented for the discovery of truth."<sup>103</sup> Presumably, cross-examination can be an even more important factor in the truth-seeking process if it is truly effective. Yet the *Ritchie* opinion stated that the defendant's confrontational right was satisfied by the mere opportunity of cross-examination at trial, without regard to the effectiveness of that questioning.<sup>104</sup> But even if the sixth amendment does not ensure effective cross-examination, Maryland courts could expand the right of confrontation under the Maryland constitution to require an inquiry into the effectiveness of cross-examination.

Challenging the witness's credibility is one of the most impor-

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99. *Id.* at 65 (Blackmun, J., concurring).

100. See Respondent's Brief at 13-14, *State v. Runge*, 317 Md. 613, 566 A.2d 88 (1989) (No. 89-28).

101. See *Davis v. Alaska*, 415 U.S. 308, 318 (1974) ("on basis of limited cross-examination . . . jury might well have thought defense counsel was engaged in a speculative and baseless . . . attack on [the witness's credibility]"); *Hopper v. State*, 64 Md. App. 97, 106, 494 A.2d 708, 713 (1985) (the judge's curtailing of defendant's questioning, designed to attack witness's credibility, was reversible error).

102. See *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987).

103. 5 J. WIGMORE, *supra* note 45, § 1367.

104. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987) (plurality opinion).

tant means of finding the truth through cross-examination.<sup>105</sup> But a defense lawyer denied access to important documents may be precluded from effectively pursuing that path. The mere opportunity to cross-examine the witness does not necessarily provide the jury with sufficient information with which to assess the witness's credibility. Entering into an open line of inquiry with no real foundation may harm the defendant's case more than it would be harmed by not cross-examining that witness at all. For example, in *State v. De-Lawder*,<sup>106</sup> the trial court prohibited the defendant, charged with carnal knowledge of a female under the age of fourteen years, from pursuing a line of questioning that would show that the victim had previously engaged in sexual intercourse with other persons.<sup>107</sup> Defense counsel intended to show that the victim accused the defendant because she was pregnant by another person and was afraid to tell her mother that she had voluntarily had intercourse.<sup>108</sup> Affirming the circuit court's order of a new trial, the Court of Special Appeals observed that the accuracy and truthfulness of the victim's testimony was the key element in the State's case.<sup>109</sup> Prohibiting the defense from exposing facts from which the jury could gauge the witness's reliability was reversible error because it denied the defendant the right of effective cross-examination.<sup>110</sup> Maryland courts can ensure that defendants have an effective means to test a witness's account of events by giving the defendant access to the witness's prior statements or to certain records, such as child abuse files.

To be sure, the State has a strong interest in preserving the confidentiality of its child abuse records.<sup>111</sup> No defendant should have unfettered access to such important records, but neither should an agency have so much discretion to deny a defendant access to any part of the file as to infringe upon her constitutional rights. An alleged child abuser's right to confront witnesses already has been weakened by a statute that permits an alleged child abuse victim to testify from outside the courtroom via closed-circuit television.<sup>112</sup> In approving the use of closed-circuit television in child

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105. See *id.* at 51-52; *Davis*, 415 U.S. at 316.

106. 28 Md. App. 212, 344 A.2d 446 (1975).

107. *Id.* at 220, 344 A.2d at 451.

108. *Id.*

109. See *id.* at 226-27, 344 A.2d at 454.

110. *Id.* at 227, 344 A.2d at 455.

111. See, e.g., *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987); *Besharov*, *supra* note 28, at 508-09.

112. See MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1988).

abuse cases, the Court of Appeals recognized that the government has a compelling interest in safeguarding the physical and psychological well-being of child victims.<sup>113</sup> Clearly, such an interest might outweigh a defendant's right to a face to face confrontation with the child. The same cannot be said of the right to "confront" the child abuse records. When an alleged abuser has access to records, the concern is not the trauma a child may suffer in testifying, but rather the protection of the identities of persons whose safety may be endangered by the information's disclosure.<sup>114</sup> Provided that the identities of such persons are protected, defendants should have access to the records.<sup>115</sup>

4. *Conclusion.*—*State v. Runge* was not a difficult decision for the Court of Appeals. The court corrected the Court of Special Appeals' rather broad interpretation of a state confidentiality statute. Since *Runge* relied solely on article 88A, section 6(b) in claiming a right of access to the child abuse records, the court correctly confined its analysis to that issue.

Future defendants, however, should challenge denial of access to confidential child abuse files as a violation of their right of confrontation. In arguing that Maryland courts should expand the right of confrontation under article 21 of the Maryland constitution, defendants can emphasize: (1) that their ability to cross-examine a witness can be restricted by both pretrial and trial events and (2) that ignoring the issue of the effectiveness of cross-examination divorces the right of confrontation from its truthseeking goals. To guarantee a fair trial, courts should not be quick to approve restrictions on a defendant's ability to cross-examine witnesses. The door remains open for Maryland courts to give real meaning to the right of confrontation.

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113. See *Wildermuth v. State*, 310 Md. 496, 518, 530 A.2d 275, 286 (1987).

114. Those persons usually include the reporter of the suspected child abuse. See MD. ANN. CODE art. 88A, § 6(b)(4) (Supp. 1989) (requiring protection of the reporter and other persons before child abuse records are disclosed).

115. In his dissent in *Ritchie*, Justice Brennan argued that the plurality's due process analysis will not prevent infringements on the rights of confrontation and cross-examination. 480 U.S. at 71-72 (Brennan, J., dissenting). According to Justice Brennan, *Jencks v. United States*, which was based on confrontation concerns, not due process concerns, required that only the defense counsel, not a trial judge, could decide what information is material for the purpose of impeaching the prosecution's witness. *Ritchie*, 480 U.S. at 72 (Brennan, J., dissenting).

*B. Defining the Limits to the Anti-Shuffling Provision of the Interstate Agreement on Detainers*

In *State v. Jefferson*<sup>116</sup> the Court of Appeals ruled that the anti-shuffling<sup>117</sup> provision of article IV(e) of the Interstate Agreement on Detainers (IAD)<sup>118</sup> requires only that a "trial" be "had" on any outstanding charges forming the detainer's basis before the receiving state is permitted to return the prisoner to the place of his original imprisonment.<sup>119</sup> The court reached its conclusion by performing a two-part analysis. First, by strictly construing the statute's language, the court found that the defendant's district court trial satisfied the IAD's anti-shuffling requirements. Read literally, the receiving state is not required to keep a prisoner until final disposition of all charges, but only until a "trial" is "had."<sup>120</sup> Second, the court found that the problems associated with the detainer system, which the statute attempts to address, primarily arise because of "unsubstantiated charges or charges that remain lodged after the prisoner is returned."<sup>121</sup> Once a prisoner faces trial and is convicted, the charges no longer are unsubstantiated.<sup>122</sup> Although a district court conviction may be overturned through a de novo appeal to the circuit court,<sup>123</sup> appeals are beyond the scope of article IV(e)'s anti-shuffling provision.<sup>124</sup>

1. *The Case.*—Anthony Jerome Jefferson was charged in the District Court of Maryland for Montgomery County with theft of

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116. 319 Md. 674, 574 A.2d 918 (1990).

117. Shuffling, or shuttling as it is alternatively called, refers to transferring prisoners between institutions pursuant to detainers issued to prosecute other charges.

118. MD. ANN. CODE art. 27, § 616E(e) (1987) (codifying article IV(e)). The provision states:

(e) *Dismissal of indictment, etc., on which no trial had.*—If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

*Id.* For the history of the Interstate Agreement on Detainers (IAD), see generally *infra* notes 140-144.

119. See 319 Md. at 684, 574 A.2d at 922.

120. *Id.* at 683, 574 A.2d at 922.

121. *Id.* (emphasis in original).

122. See *id.*

123. See *id.*; MD. CTS. & JUD. PROC. CODE ANN. § 12-301(d) (1989); *infra* notes 129 & 130.

124. See 319 Md. at 684, 574 A.2d at 922.

goods valued at more than \$300.<sup>125</sup> Before he was tried on this charge, District of Columbia officials incarcerated him in the Lorton Penitentiary for another offense.<sup>126</sup> On April 19, 1990, while still at Lorton, Jefferson was served with a detainer<sup>127</sup> issued on the theft charge.<sup>128</sup> The next day, he was transferred to Montgomery County to stand trial before the district court.<sup>129</sup>

On May 19, 1988, Jefferson was convicted in the district court of theft of goods having a value in excess of \$300, and sentenced to a term of imprisonment. On the same day, he appealed to the Circuit Court for Montgomery County for a trial de novo.<sup>130</sup> On May 23, 1988, Maryland officials returned Jefferson to Lorton, prior to the de novo circuit court trial.<sup>131</sup>

On July 13, 1988, Jefferson moved to dismiss the theft charges, claiming that his return to Lorton before the trial de novo violated article IV(e) of the IAD.<sup>132</sup> He argued that a "trial" was not "had" under the IAD's terms, and therefore, the theft charge should be dismissed with prejudice.<sup>133</sup> He also claimed that a de novo appeal is a continuation of the district court trial, and is not a second

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125. *Id.* at 676, 574 A.2d at 918; see MD. ANN. CODE art. 27, § 342 (1987) (consolidated theft statute). Theft of goods worth more than \$300 is a felony offense. See *id.*

126. Brief for Respondent at 1, *State v. Jefferson*, 319 Md. 674, 574 A.2d 918 (1990) (No. 130).

127. Under the IAD, "a detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted for some pending criminal charges in another jurisdiction." H.R. REP. NO. 1018, 91st Cong., 2d Sess. 2 (1970); S. REP. NO. 1356, 91st Cong., 2d Sess. 2 (1970), reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4864, 4865. Cf. *Carchman v. Nash*, 473 U.S. 716, 725 (1985) (a detainer based on a probation-violation charge is not a detainer within the meaning of the IAD's article III); *United States v. Mauro*, 436 U.S. 340, 360-61 (1978) (a writ of habeas corpus to prosecute (*ad prosequendum*) issued by a federal court to state authorities, directing a state prisoner's production for trial on federal criminal charges, is not a detainer within IAD's meaning and thus does not trigger its operation).

128. *Jefferson*, 319 Md. at 676, 574 A.2d at 918. The District Court of Maryland for Montgomery County originally issued the detainer as an arrest warrant on November 23, 1987. *Id.*

129. *Id.* In Maryland, the district court has exclusive original jurisdiction over many criminal offenses. See MD. CTS. & JUD. PROC. CODE ANN. § 4-301 (1989); see also *id.* § 4-302 (listing exceptions to the district court's original jurisdiction).

130. *Jefferson*, 319 Md. at 676, 574 A.2d at 918. In Maryland, "[a] party in a civil case or the defendant in a criminal case may appeal from a final judgment entered in the District Court." MD. CTS. & JUD. PROC. CODE ANN. § 12-401(a) (1989). In all criminal cases, the appeal shall be tried de novo, unless both parties agree to an appeal heard on the record. *Id.* § 12-401(d).

131. Brief of Respondent at 2, *Jefferson v. State*, 319 Md. 674, 574 A.2d 918 (1990) (No. 130).

132. *Id.*

133. *Jefferson*, 319 Md. at 677, 574 A.2d at 919.



proceeding.<sup>134</sup>

The circuit court agreed with Jefferson's interpretation of article IV(e) of the IAD. Focusing on the IAD's general purpose, it said that a jurisdiction that has obtained temporary custody of another jurisdiction's prisoner must "complete its business with the prisoner before returning him to the custodial jurisdiction."<sup>135</sup> Having concluded that the IAD contemplated Jefferson's continued detention in Maryland until his appeal de novo was completed, the court held that Jefferson was entitled to dismissal of all outstanding charges.<sup>136</sup> The State appealed, and the Court of Appeals granted certiorari<sup>137</sup> to consider whether Jefferson's rights under the IAD were violated when he was returned to Lorton before his circuit court de novo appeal.<sup>138</sup> The Court of Appeals reversed the circuit court's judgment and held that "[t]he final judgment rendered against Jefferson in the District Court satisfied § 616E(e)'s [article IV(e)'s] requirement that a 'trial' be 'had' on the 'complaint contemplated hereby,' regardless of whether the de novo trial was 'had' as well."<sup>139</sup>

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134. *Id.*

135. Memorandum and Order at 3, *State v. Jefferson*, Criminal No. 51516 (Cir. Ct. Montgomery Co., Aug. 21, 1989), reprinted in Joint Record Abstract at 28, *State v. Jefferson*, 319 Md. 674, 574 A.2d 918 (1990) (No. 130). See *Boyd v. State*, 51 Md. App. 197, 203, 441 A.2d 1133, 1137 (1982) (IAD requires that the "receiving State, once it has obtained custody of the prisoner under the Act, wrap up its business with him, so to speak, before returning him to the custodial (sending) State"), *aff'd*, 294 Md. 103, 447 A.2d 871 (1982).

136. See Joint Record Abstract at 30.

137. The Court of Appeals, not the Court of Special Appeals, has authority to review this type of decision:

The Court of Appeals shall require by writ of certiorari that a decision be certified to it for review and determination in any case in which a circuit court has rendered a final judgment on appeal from the District Court . . . if it appears to the Court of Appeals, upon petition of a party that:

(1) Review is necessary to secure uniformity of decision, as where the same statute has been construed differently by two or more judges; or

(2) There are other special circumstances rendering it desirable and in the public interest that the decision be reviewed.

MD. CTS. & JUD. PROC. CODE ANN. § 12-305 (1989). *But cf.* *Legal Aid Bureau v. Farmer*, 74 Md. App. 707, 709-14, 539 A.2d 1173, 1175-79 (1988) (holding that the Court of Special Appeals had appellate jurisdiction over a circuit court order imposing sanction on attorney).

138. See *Jefferson*, 319 Md. at 678, 574 A.2d at 919.

139. *Id.* at 684, 574 A.2d at 922.

## 2. *Legal Background.*—

### a. *Interstate Agreement on Detainers.*—

(1) *The Agreement's Legislative History and Purpose.*—The IAD is a compact among forty-eight states,<sup>140</sup> the District of Columbia, Puerto Rico, the Virgin Islands, and the United States government.<sup>141</sup> The Agreement's text generally follows the Council of State Governments' Suggested Legislative Program for 1957.<sup>142</sup> Maryland enacted the Agreement in 1965,<sup>143</sup> responding to the well-documented shortcomings of the detainer system as it existed prior to the IAD's enactment.<sup>144</sup>

140. Only Mississippi and Louisiana have not enacted the IAD. See 18 U.S.C.A. app. § 1 historical note (West 1985) (listing state versions of the IAD).

141. See *Carchman v. Nash*, 473 U.S. 715, 719 (1985). Congress enacted the Interstate Agreement on Detainers Act in 1970, joining the United States and the District of Columbia as parties. See Interstate Agreement on Detainers Act, Pub. L. No. 91-538, 84 Stat. 1397 (codified at 18 U.S.C. app. § 2); H.R. REP. NO. 1018, 91st Cong., 2d Sess. 2, S. REP. NO. 1356, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4864, 4865 (for legislative history).

142. See COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1957 (1956).

The IAD's origins can be traced to 1948, when the Joint Committee on Detainers issued a report detailing problems arising from the detainer system. See *United States v. Mauro*, 436 U.S. 340, 349-50 (1978). Justice White, writing for the majority in *Mauro*, explained that five guiding principles emerged from the Joint Committee on Detainers' report, and served as the "underpinnings of the Agreement":

1. Every effort should be made to accomplish the disposition of detainers as promptly as possible.

2. There should be assurance that any prisoner released to stand trial in another jurisdiction will be returned to the institution from which he was released.

3. Prison and parole authorities should take prompt action to settle detainers which have been filed by them.

4. No prisoner should be penalized because of a detainer pending against him unless a thorough investigation of the detainer has been made and it has been found valid.

5. All jurisdictions should observe the principles of interstate comity in the settlement of detainers, and each should bear its own proper burden of the expenses and effort involved in disposing of the charges and settling detainers.

436 U.S. at 350 (citing Bennett, *The Last Full Ounce*, 23 FED. PROBATION 20, 22 (1959)).

143. See Act of May 4, 1965, ch. 627, 1965 Md. Laws 862 (codified at MD. ANN. CODE art. 27, §§ 616A-616R (1987)). Maryland has also enacted an Intrastate Agreement on Detainers. See MD. ANN. CODE art. 27, § 616S (1987); see also *Barnes v. State*, 20 Md. App. 262, 268, 315 A.2d 117, 121 (interstate and intrastate agreements on detainers should be construed together, harmonizing their general purpose and scope), *aff'd*, 273 Md. 195, 328 A.2d 737 (1974).

144. See *infra* note 149 (listing the detainer system's deleterious effects); see generally *Carchman v. Nash*, 473 U.S. 716, 719-21 (1985) (the IAD was an attempt to correct the detainer system's deficiencies); *Mauro*, 436 U.S. at 349-53 (history of the IAD's enact-

Before the IAD was adopted, prosecutors often filed detainers based on criminal charges having little basis, only later to withdraw these near the end of a prisoner's sentence.<sup>145</sup> This practice has been termed "corrosive" to the rehabilitative process.<sup>146</sup> The Agreement's general purpose, spelled out in article I, demonstrates legislative recognition of this problem:

The party states find that the charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.<sup>147</sup>

The case law acknowledges that unsubstantiated detainers based on untried charges adversely affect prisoners.<sup>148</sup> The IAD's enactment provided a uniform method of resolving detainers by limiting their deleterious effects.<sup>149</sup>

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ment); Bennett, *supra* note 142, at 22 (detailing initial steps taken to reduce the detainer system's unfairness).

145. See *Carchman*, 473 U.S. at 729 & n.6; H.R. REP. NO. 1018, 91st Cong., 2d Sess. 3, S. REP. NO. 1356, 91st Cong. 2d Sess. 3, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4864, 4865.

146. See Bennett, *supra* note 142, at 21.

147. MD. ANN. CODE art. 27, § 616B (1987).

148. See *Jefferson*, 319 Md. at 679, 574 A.2d at 920.

149. See *id.* at 680, 574 A.2d at 920; *United States v. Mauro*, 436 U.S. 340, 359-60 (1978).

Many courts have described these effects. The *Jefferson* court summarized the most inclusive list as follows:

[T]he inmate is (1) deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed; (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons (i.e., honor farms or forestry camp work); (4) ineligible for trustee [sic] status; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release programs or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions within the correctional system, which

The IAD contains two procedures for disposing of detainees: the prisoner may request final disposition under article III, or a party state may request temporary custody or availability under article IV.<sup>150</sup> When disposition is requested under either method, the prosecutor is required to bring the prisoner to trial on any "indictment, information or complaint" before returning the prisoner to the "original place of imprisonment."<sup>151</sup> If "trial is not had," the detainee must be dismissed with prejudice.<sup>152</sup>

(2) *Interpretation by the Courts.*—The IAD's legislative history does not specifically define the term "trial," nor does it directly address what is required for a trial to be "had."<sup>153</sup> Courts have agreed, however, that a trial is not had when a prisoner is returned to the sending jurisdiction before trial, unless the prisoner is returned at his own request.<sup>154</sup>

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includes the removal of any possibility of transfer to an institution more appropriate to youthful offenders; (8) not entitled to preferred prison jobs which carry higher wages and entitle [him] to additional good credits against [his] sentence; (9) inhibited by the denial of possibility of parole or any commutation of his sentence; (10) caused anxiety and thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities.

319 Md. at 679-80, 574 A.2d at 920 (quoting *Carchman*, 473 U.S. at 730 n.8, which in turn quotes *Cooper v. Lockhart*, 489 F.2d 308, 314 n.10 (8th Cir. 1973) (brackets in original)).

150. See MD. ANN. CODE art. 27, §§ 616D, 616E (1987); *United States v. Coffman*, 905 F.2d 330, 331 (10th Cir. 1990); see also *Mauro*, 436 U.S. at 351-52 (explaining IAD provisions); *Clipper v. State*, 295 Md. 303, 304, 455 A.2d 973, 974-75 (1983) (explaining procedural details).

151. MD. ANN. CODE art. 27, §§ 616D(a), (d), 616E(a), (d) (1987).

152. See *id.* §§ 616D(d), 616E(e) (1987).

153. See, e.g., COUNCIL OF STATE GOVERNMENTS, *supra* note 142; see also *Carchman*, 473 U.S. at 744 (Brennan, J., dissenting) (the term "trial" as used in article III, represents the "broader concept of 'final disposition'"); *Tinghitella v. California*, 718 F.2d 308, 311 (9th Cir. 1983) (the IAD's use of "trial" encompasses sentencing). *But cf.* *Carchman*, 473 U.S. at 728 (congressional legislative history suggested that Congress believed that the agreement required a trial only for "detainees based on untried criminal charges"); *United States v. Coffman*, 905 F.2d 330, 333 (10th Cir. 1990) (the term "trial" as used in the Agreement's anti-shuffling provision does not include sentencing).

154. See *Gillard v. State*, 486 So. 2d 1323, 1327-28 (Ala. Crim. App. 1986) (article III(e) was violated when a prisoner was returned prior to trial); *Marshall v. Superior Court*, 183 Cal. App. 3d 662, 667, 228 Cal. Rptr. 364, 367 (1986) (a prisoner transferred in order to enter a guilty plea, and returned after the prosecutor dismissed charges, could not be subject to a new detainee on the same charges); *State v. Moser*, 445 So. 2d 696, 697 (Fla. Dist. Ct. App. 1984) (the prisoner's return before trial violated the "anti-shuffling" provision).

Many courts have refused to apply the anti-shuffling provision when the prisoner requested return to the original jurisdiction. See *United States v. Boggs*, 612 F.2d 991 (5th Cir.), *cert. denied*, 449 U.S. 857 (1980); *Gray v. Benson*, 608 F.2d 825 (10th Cir.

The question presented in *Jefferson*—whether a de novo trial on appeal is a new proceeding or is a continuation of the original trial—is a case of first impression in Maryland.<sup>155</sup> The court's analysis in *Jefferson* can be better understood in light of various courts' treatment of whether the IAD term "trial" encompasses sentencing.

In *Tinghitella v. California*,<sup>156</sup> a Texas prisoner filed a writ of habeas corpus, claiming that California violated his "speedy trial" rights under the IAD<sup>157</sup> by refusing to return him to California for sentencing.<sup>158</sup> By analogizing the IAD's use of "trial" to the sixth amendment's use of "trial,"<sup>159</sup> the United States Court of Appeals for the Ninth Circuit concluded that the terms "trial" and "final disposition" as used in the IAD encompass sentencing.<sup>160</sup> The court found that "[b]oth the rehabilitative and fair treatment purposes of the IAD would be better effectuated by construing trial to include sentencing."<sup>161</sup> Establishing the sentence's length is important both from the perspective of the prisoner's morale and proclivity for rehabilitation, and his eligibility to participate in certain rehabilitative programs, which may depend on the length of the sentence to

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1979); *People v. Engelson*, 55 A.D.2d 960, 391 N.Y.S.2d 446 (1977) (anti-shuffling provision was not violated where prisoner requested return); *United States v. Ford*, 550 F.2d 732 (2d Cir. 1977), *aff'd on other grounds, sub nom. United States v. Mauro*, 436 U.S. 340 (1978); *Commonwealth v. Mallon*, 279 Pa. Super. 350, 421 A.2d 234 (1980) (prisoner requested return in order to keep his job at the sending state's prison).

155. See *Jefferson*, 319 Md. at 678, 574 A.2d at 919.

156. 718 F.2d 308 (9th Cir. 1983).

157. See, e.g., MD. ANN. CODE art. 27, § 616D(a) (1987) (requires the receiving state to bring the prisoner to trial within 180 days of the request for "final disposition" under the IAD). The court denied *Tinghitella* relief, finding that he had not complied with the IAD's procedural requirements. See 718 F.2d at 313.

158. 718 F.2d at 310. *Tinghitella* jumped bail in California after his conviction but prior to sentencing on an assault charge. *Id.* Authorities learned several years later that he was incarcerated in Texas, and California placed a detainer on him. California refused to comply with his request under article III(a) to return to California for final disposition of the charge. *Id.*

159. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."). The *Tinghitella* court noted that the Supreme Court has yet to decide whether sentencing is part of the trial for sixth amendment purposes. See 718 F.2d at 313 (1983); see also *Pollard v. United States*, 352 U.S. 354, 361 (1957) (the Court assumed "arguendo that sentence is part of the trial for purposes of the Sixth Amendment").

The *Tinghitella* court stated that the Ninth Circuit and others have followed the Supreme Court's assumption in *Pollard*, and have treated sentencing as part of the trial for sixth amendment purposes. See 718 F.2d at 312-13; see, e.g., *United States v. Merivall*, 600 F.2d 717, 720 (8th Cir. 1979); *United States v. Campisi*, 583 F.2d 692, 694 (3d Cir. 1978); *United States v. Reese*, 568 F.2d 1246, 1252-53 (6th Cir. 1977) (employing a balancing test to determine reasonableness of delay in sentencing).

160. See *Tinghitella*, 718 F.2d at 308, 311 (9th Cir. 1983).

161. *Id.* at 311 n.5.

be served in the receiving state.<sup>162</sup>

The Tenth Circuit in *United States v. Coffman*, however, expressly rejected the *Tinghitella* court's reasoning.<sup>163</sup> In *Coffman*, the court held that "trial" in the IAD anti-shuttling provision does not include sentencing.<sup>164</sup> The *Coffman* opinion focused on the IAD's use of the terms "disposition," "final disposition," "prosecution," and "trial."<sup>165</sup> The court found that "disposition," as used in the IAD, refers to the final resolution of charges;<sup>166</sup> "final disposition" encompasses both imposition and service of sentence;<sup>167</sup> and "prosecution" includes the ambit of proceedings based on an "untried indictment, information, or complaint."<sup>168</sup> The court noted that in articles III(d) and IV(e), the drafters chose to use the term "trial" rather than "disposition," "final disposition," or "prosecution."<sup>169</sup> The court concluded that this statutory construction illustrated the drafters' intent:

In our view this change in terminology reflects a decision to limit the scope of the anti-shuttling provisions to pre-conviction transfers. If the drafters had wished to extend the IAD's anti-shuttling provisions to incidences occurring after the trial but before sentencing, they could have used the term "disposition," "final disposition," or "prosecution." They did not. Isolating the sentences containing the word "trial," as the Ninth Circuit and *Carchman* dissent apparently did, renders meaningless the use of the words "disposition," "final disposition," and "prosecution" in the other articles of the IAD.<sup>170</sup>

The Tenth Circuit adopted the position that this interpretation does not detract from the IAD's clearly defined purpose to facilitate

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162. *See id.*

163. 905 F.2d 330, 331 (10th Cir. 1990) (decided one day before *Jefferson*).

164. *See id.* at 332.

165. *See id.*

166. *See id.*; MD. ANN. CODE art. 27, § 616B (1987) ("the purpose of this agreement [is] to encourage the expeditious and orderly disposition of such charges").

167. *See* 905 F.2d at 332; MD. ANN. CODE art. 27, § 616D(e) (1987).

168. *See* 905 F.2d at 332; MD. ANN. CODE art. 27, § 616F(d) (1987) ("[T]emporary custody . . . shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer.").

169. *See* 905 F.2d at 332.

170. *Id.* But *see* *Carchman v. Nash*, 473 U.S. 716, 744 (1985) (Brennan, J., dissenting) (claiming that article III uses the terms "trial" and "final disposition" interchangeably); *Tinghitella v. California*, 718 F.2d 308, 311 (9th Cir. 1983) ("central policy foundations of the IAD support a broad construction of the term 'trial'").

prisoner rehabilitation.<sup>171</sup> Though Coffman's sentencing was completed in less than one day, the possibility of long delays, lasting weeks or months, clearly undermines the effectiveness of the sending state's rehabilitative programs.<sup>172</sup> The court thus concluded that an interpretation of "trial" to include sentencing would effectively defeat one of the IAD's stated purposes.<sup>173</sup>

*b. De Novo Appeal in Maryland—Is a De Novo Trial a New Proceeding?*—In Maryland, the district court has exclusive original jurisdiction over a wide range of relatively serious crimes.<sup>174</sup> Maryland law<sup>175</sup> grants defendants in criminal cases the right to appeal from a district court final judgment.<sup>176</sup> The law also provides the defendant in a criminal case the right to an appeal tried de novo.<sup>177</sup>

The Court of Appeals has "consistently treated de novo appeals as wholly original proceedings, that is, as if no judgment had been entered in the lower court."<sup>178</sup> Nevertheless, the circuit court conducts the de novo trial as part of its appellate jurisdiction.<sup>179</sup> For example, because of the proceeding's appellate nature, the de novo trial must be tried under the same charging document.<sup>180</sup>

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171. See 905 F.2d at 333.

172. See *id.* Jefferson noted in his brief that prisoners commonly are transferred between the District of Columbia and Maryland facilities. See Brief of Respondent at 5, *Jefferson v. State*, 319 Md. 674, 574 A.2d 918 (1990) (No. 130). With this in mind, the *Jefferson* court's decision likely was influenced by the effect its ruling may have on large numbers of prisoners. The court did not fully articulate the practical considerations, but these cannot be ignored.

173. See 905 F.2d at 333. *Jefferson* took a similar position by viewing the statute as a whole. See 319 Md. at 684-85, 574 A.2d at 922-23.

174. See *supra* note 129; see also *State v. Anderson*, 320 Md. 17, 29 n.4, 575 A.2d 1227, 1232 n.4 (1990) (distinguishing the Maryland appellate system from the Massachusetts "two-tier" system).

175. See MD. CTS. & JUD. PROC. CODE ANN. § 12-401(a) (1987).

176. See *supra* note 130; see, e.g., *Harper v. State*, 312 Md. 396, 397, 540 A.2d 124, 125 (1988) (the defendant was entitled to a jury trial de novo in the circuit court on appeal from a district court order finding him in criminal contempt).

177. See *supra* note 130.

178. *Hardy v. State*, 279 Md. 489, 493, 369 A.2d 1043, 1046 (1977). The Court of Appeals has interpreted de novo to mean "afresh" or "anew." See *id.* at 493, 369 A.2d at 1046. See also *Pinkett v. State*, 30 Md. App. 458, 468, 352 A.2d 358, 365 (1976) (de novo appeal must be tried on the same charging document as the district court trial).

179. See *Hardy*, 279 Md. at 493, 369 A.2d at 1046.

180. See *Pinkett*, 30 Md. App. at 468, 352 A.2d at 365. See also *Lewis v. State*, 289 Md. 1, 4, 421 A.2d 974, 977 (1976) (ruling that the appellate trial is based on the original district court charging document); Md. R. 4-201(c)(3) (on appeal, a defendant is entitled to a trial in circuit court on the charging document filed in the district court); Md. R. 1314b (rule 4-204, governing amendments to charging documents applies in appellate court). Maryland's use of the term charging document is consistent with the IAD's reference to "untried indictment, information, or complaint." See *supra* note 168.

Discussing the second trial's de novo nature, the Court of Special Appeals has stated that "[t]he de novo trial washes out the trial in the District Court but not the basis for it."<sup>181</sup> The Supreme Court, describing the analogous Massachusetts "two-tier" system for trying minor crimes, found that "the second stage proceeding can be regarded as but an enlarged, fact-sensitive part of a single, continuous course of judicial proceedings."<sup>182</sup>

These descriptions could lead to the conclusion that the de novo trial in Maryland is a successive element of a fact finding process, continuing the original trial.<sup>183</sup> The Court of Appeals, however, dismissed this interpretation in a decision issued after *Jefferson*, declaring that the Supreme Court's description of the Massachusetts system "would not be an appropriate description of Maryland's system."<sup>184</sup>

3. *Analysis.*—The nature of the Maryland de novo trial system supports Jefferson's contention that article IV(e) of the IAD prohibits a prisoner's return to his original place of imprisonment before de novo trial in the circuit court.<sup>185</sup> The *Jefferson* court, however, citing the language of article IV(e), maintained that:

[t]he "anti-shuffling" provision of § 616E(e) does not, by its terms, require the receiving state to keep a prisoner until the final disposition of the charges against him. It only requires that a "trial" be "had" on the charges. Had the IAD intended to require that the receiving state hold a prisoner until all appeals were exhausted, rather than just until completion of the trial, it would have said so in no uncertain language.<sup>186</sup>

The Court of Appeals' reasoning closely parallels that of the

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181. *Pinkett*, 30 Md. App. at 469, 352 A.2d at 366.

182. *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 309. The Massachusetts "two-tier de novo system," applies only to minor crimes, and is significantly different from Maryland's de novo appellate procedure. In Massachusetts, the only appeal available to a criminal defendant convicted of a minor crime is a trial de novo before a jury session of the same court, and the initial judgment is vacated upon application for a trial de novo. *State v. Anderson*, 320 Md. 17, 29 n.4, 575 A.2d 1227, 1232 n.4 (1990). Compare *supra* notes 129-130 (describing Maryland's district court and appellate system).

183. See Brief of Respondent at 13, *Jefferson v. State*, 319 Md. 674, 574 A.2d 918 (1990) (No. 130).

184. See *State v. Anderson*, 320 Md. 17, 29, n.4, 575 A.2d 1227, 1232, n.4 (1990) (discussed *supra* note 182).

185. See Brief of Respondent at 13, *Jefferson v. State*, 319 Md. 674, 574 A.2d 918 (1990) (No. 130).

186. 319 Md. at 683, 574 A.2d at 922.



Tenth Circuit in *Coffman*.<sup>187</sup> The *Coffman* court held that "trial" in the IAD anti-shuffling provision does not include sentencing.<sup>188</sup> Though the Court of Appeals did not cite *Coffman*, it noted that at least three other jurisdictions have held inapplicable the IAD's anti-shuffling provision when a prisoner is returned to his original place of imprisonment after a mistrial, but before a retrial.<sup>189</sup> These parallels support a literal interpretation of the anti-shuffling provision's language.<sup>190</sup> By its terms, the IAD requires only that a "trial" be "had."<sup>191</sup>

But the court relied more heavily on the IAD's legislative purpose, which was to address broader concerns associated with detainees "based on *unsubstantiated* charges, or charges that remain lodged after the prisoner is returned."<sup>192</sup> After the district court convicted him, Jefferson no longer faced unsubstantiated charges.<sup>193</sup> The court acknowledged that his conviction could be overturned on his *de novo* appeal.<sup>194</sup> It found, however, that his appeal constituted a new trial, and required that a new detainer be issued requesting his presence for the appeal.<sup>195</sup>

Although the court concluded that the anti-shuffling provision did not apply, it also stated that Jefferson was still protected under IAD, article III,<sup>196</sup> which provides that he be brought to trial within 180 days after serving on the prosecutor written notice of request for final disposition.<sup>197</sup> In addition, the court noted that the Constitution guarantees Jefferson the right to a speedy trial.<sup>198</sup>

The court grounded its decision primarily on a finding that the IAD's article IV was based solely on the problems associated with

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187. See *United States v. Coffman*, 905 F.2d 330 (10th Cir. 1990). Both courts look for support to the text of the IAD. The Tenth Circuit, however, went farther than the *Jefferson* court in its analysis of the terms "trial," "disposition," "final disposition," and "prosecution." See *supra* notes 165-170 and accompanying text.

188. See 905 F.2d at 333.

189. See 319 Md. at 684, 574 A.2d at 922. The court cited *United States v. Evans*, 423 F. Supp. 528 (S.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 561 (2d Cir. 1977); *Shanks v. Commonwealth*, 574 S.W.2d 688, 690 (Ky. Ct. App. 1978); *Wilkett v. State*, 753 P.2d 383 (Okla. Crim. App. 1988).

190. See *Jefferson*, 319 Md. at 684, 574 A.2d at 922.

191. See *supra* note 118.

192. 319 Md. at 683, 574 A.2d at 922 (emphasis in original).

193. See *id.*

194. See *id.*

195. See *id.* at 683-84, 574 A.2d at 922.

196. See *id.* at 685, 574 A.2d at 923.

197. See MD. ANN. CODE art. 27, § 616D(a) (1987).

198. See 319 Md. at 685, 574 A.2d at 923; see also *supra* note 159.

unsubstantiated charges.<sup>199</sup> Through this approach, the court reached a sound conclusion, but the reasoning it employed raised unnecessary questions. The court could more easily have reached the same decision by employing the reasoning found in *Coffman*. The *Coffman* court focused on article IV's language, and found that the word "trial" did not mean "disposition" or "final disposition."<sup>200</sup> Clearly, the *Jefferson* court could have found that the plain meaning of "trial" does not include a de novo appeal, but rather is encompassed within the term "final disposition."

Still, the IAD's terms will protect Jefferson when he is returned to Maryland for his trial de novo.<sup>201</sup> But this conclusion poses a problem. Although the court found that Jefferson no longer faces unsubstantiated charges, having been convicted by the district court, he still faces a de novo trial on appeal.<sup>202</sup>

In order to obtain Jefferson's presence for the de novo trial, the prosecution must issue a detainer requesting it.<sup>203</sup> In theory, the IAD will guarantee certain protections with regard to this detainer.<sup>204</sup> This second detainer, however, will be based on the same charging document as the first detainer.<sup>205</sup> Since the court already has concluded that these charges no longer are unsubstantiated, it is not clear how Jefferson can effectively use the IAD to guarantee his procedural rights.

Maryland law guarantees Jefferson the right to appeal his district court conviction,<sup>206</sup> but the Court of Appeals' logic denies him the IAD's anti-shuffling provision protection during the course of his second trial. The court concluded that the anti-shuffling provision only protects prisoners from detainers based on unsubstantiated charges.<sup>207</sup> The charges in Jefferson's case were resolved when a final judgment was entered by the district court. It follows that Jefferson may not rely on the anti-shuffling provision's protection during the second trial, even though unnecessary transfers between facilities could hinder his ability to mount a successful defense.

The court's logic implies that Jefferson will be denied all IAD protection during his second trial. The court found the anti-shuf-

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199. See *id.*

200. See 905 F.2d at 332.

201. See 319 Md. at 683-85, 574 A.2d at 922-23.

202. See *id.* at 683, 574 A.2d at 922.

203. See *id.* at 683-84, 574 A.2d at 922.

204. See *id.* at 685, 574 A.2d at 923.

205. See *supra* note 180 and accompanying text.

206. See MD. CTS. & JUD. PROC. CODE ANN. § 12-401 (1989).

207. See 319 Md. at 683, 574 A.2d at 922.

fling provision inapplicable after the district court conviction because "the problems and uncertainties associated with detainers are based on unsubstantiated charges or charges that remain lodged after the prisoner is returned."<sup>208</sup> The new detainer is not based on unsubstantiated charges. It follows that the entire IAD is inapplicable after the second trial, and not just the anti-shuffling provision. The court likely did not intend this result. Nevertheless, the court's restrictive reading of the IAD's purpose may unnecessarily limit its usefulness in future cases.

4. *Conclusion.*—The Court of Appeals in *Jefferson* eliminated any remaining uncertainty over the limits of the IAD's anti-shuffling provision. The court held that article IV of the IAD requires only that a "trial" be "had" on the charges against a prisoner,<sup>209</sup> and that a final judgment in a district court trial constitutes a "trial" for the IAD's purposes.<sup>210</sup>

Though the court did not decide the issue of whether post-conviction sentencing is part of a "trial," the *Jefferson* opinion's logic makes it clear that the anti-shuffling provision will be read literally.<sup>211</sup> It is unlikely that the court would accept any interpretation of "trial" that includes post-conviction sentencing.<sup>212</sup> Moreover, once a district court convicts a prisoner, he no longer faces unsubstantiated charges.<sup>213</sup> Extending *Jefferson's* reasoning, the anti-shuffling provision may not apply to prisoner transfers after conviction, but before sentencing.

The *Jefferson* court nevertheless read the anti-shuffling provision as narrowly as possible. The result is an added degree of certainty in interpretation of statutory language.

DAVID B. MONKS  
JEROME A. MURPHY

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208. *Id.*

209. *See id.*

210. *See id.* at 684, 574 A.2d at 922.

211. *See id.* at 683-84, 574 A.2d at 922.

212. *See United States v. Coffman*, 905 F.2d 330, 332 (10th Cir. 1990). *But see Tinghitella v. California*, 718 F.2d 308, 311 (9th Cir. 1983).

213. *See* 319 Md. at 683, 574 A.2d at 922.

## V. EMPLOYMENT

### A. Portability of State Pension Benefits

In *Morris v. Prince George's County*,<sup>1</sup> the Court of Appeals interpreted Maryland Code article 73B, section 32(a)<sup>2</sup> and found that the legislative policy favoring pension benefit portability necessitates allowing transferees to carry actual years of service from their former retirement system to their new retirement system for the purpose of determining retirement eligibility.<sup>3</sup> The decision was important because the Maryland State Retirement System (MSRS) and the Prince George's County Police Pension Plan (the Plan) have different employee contribution rates and retirement eligibility.<sup>4</sup>

Just two days before the court issued the *Morris* decision, the legislature amended section 32 by adding a new subsection<sup>5</sup> which provides an exception to the *Morris* holding for police or fire department pension plans, allowing them to set their own guidelines as to whether the years of prior service will be credited in the new system on a one-for-one basis.<sup>6</sup> For those transferring within State or local government pension plans other than police or fire departments, the *Morris* holding remains effective.

1. *The Case.*—In 1971, Daniel Morris joined the Prince George's County Sheriff's Department, and approximately two years later he began contributing to MSRS.<sup>7</sup> In 1982, after serving eleven years as a deputy sheriff, Morris transferred to the Prince

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1. 319 Md. 597, 573 A.2d 1346 (1990).

2. MD. ANN. CODE art. 73B, § 32(a) (Supp. 1989).

3. 319 Md. at 600, 573 A.2d at 1347.

4. See *infra* notes 58-66 and accompanying text.

5. See Act of May 29, 1990, ch. 609, 1990 Md. Laws 2655 (chapter 609 originally labeled the amended section as § 32(e), but when compiled as part of the 1990 Cumulative Supplement to the Code, the section was changed to § 32(f)).

6. See MD. ANN. CODE art. 73B, § 32(f) (Supp. 1990).

[W]hen a member of a retirement or pension system operated by the State or a political subdivision of the State transfers to a police or fire department retirement or pension system operated by the State or a political subdivision of the State, the plans, rules, regulations, guidelines, and policies of the retirement or pension system into which the member transfers shall govern in determining:

(i) The years of service necessary to qualify the member for retirement

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... and the amount of retirement benefits to be credited.

*Id.*

7. Brief for Appellant at 2, *Morris* (No. 89-121).

George's County Police Department.<sup>8</sup> Similarly, Eric Olsen in 1976 joined the Prince George's County Sheriff's Department and began contributing to the MSRS. Eight years later, Olsen also transferred to the Prince George's County Police Department.<sup>9</sup>

Morris and Olsen each asked Prince George's County whether their MSRS benefits would transfer, and claimed that they were assured that their credited service with the Sheriff's Department would be fully applied, and that they would be eligible for retirement after a total of twenty years continued service.<sup>10</sup>

Nevertheless, the Prince George's County Pension Plan Administrative Review Board ruled in 1987 that neither Morris nor Olsen could count their years of service as sheriffs' deputies for computing their date-of-retirement eligibility from the police department.<sup>11</sup> The Review Board based its decision on the Plan's requirement that an individual serve twenty years "as a police officer" before becoming eligible for retirement.<sup>12</sup>

In July 1987, Morris and Olsen filed a complaint for a declaratory judgment, and the Circuit Court for Prince George's County rendered a decision in April 1989.<sup>13</sup> The circuit court considered how to interpret article 73B, section 32(a),<sup>14</sup> which states in relevant part that "the member shall receive service credit in the system into which the member transfers for and in the amount of benefits accumulated in the system from which the member transfers."<sup>15</sup> Morris

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8. 319 Md. at 600, 573 A.2d at 1347.

9. Brief for Appellant at 2-3.

10. *See id.* Morris testified at deposition that a county administrator specifically assured him that "his time in the Sheriff's Department would count toward the twenty years required by the Prince George's County Police Department prior to retirement." *Id.* at 2.

11. *Morris*, 319 Md. at 600-01, 573 A.2d at 1347.

12. *See id.* at 601, 573 A.2d at 1347. Thus, Morris and Olsen would have to serve in the County police department for twenty years, regardless of how much time they served in another branch of state or local government. *See id.* at 601 n.1, 573 A.2d at 1347 n.1. "The police pension plan makes it clear that a police officer is a sworn member of the Prince George's County Police Department. As deputy sheriffs, Morris and Olsen did not qualify." *Id.* Under the Plan, an employee must serve either 20 years as a police officer, or until age 55. *See* PRINCE GEORGE'S COUNTY, MD., POLICE PENSION PLAN § 1 (1983). The MSRS requires that an employee work either 25 years or reach the age of 60. *See* MD. ANN. CODE art. 73B, § 11(1)(a) (1988 & Supp. 1990).

13. *See Morris v. Prince George's County*, No. CAL 87-11653 (Cir. Ct. for Prince George's County, Apr. 27, 1989), *vacated*, 319 Md. 597, 573 A.2d 1346 (1990); *see also* 319 Md. at 601-02, 573 A.2d at 1347-48.

14. 319 Md. at 600, 573 A.2d at 1347.

15. MD. ANN. CODE art. 73B, § 32(a) (Supp. 1989). This section reads, in its entirety:

If a member transfers from a retirement or pension system operated on an actuarial basis where accumulated contributions are deducted on all earnable

and Olsen argued that section 32(a) requires that their time served as deputy sheriffs must count as actual service as Prince George's County police officers for the purpose of determining their retirement dates under the Plan.<sup>16</sup> The Pension Plan Review Board argued that it requires that their years of service transfer from MSRS to the Plan only for the purpose of computing retirement benefits, but not for the purpose of determining the retirement date. The circuit court agreed with the Review Board, and found that the legislature intended section 32 to permit only monetary benefits, and not years of service, to transfer from the first to the second pension plan.<sup>17</sup>

Morris and Olsen appealed to the Court of Special Appeals,<sup>18</sup> but the Court of Appeals issued a writ of certiorari before proceedings began in that court.<sup>19</sup>

2. *Legal Background and the Court's Reasoning.*—The Court of Appeals held that Morris and Olsen were entitled to carry the number of years served from the old pension plan to the new one for the purpose of determining the year they would be eligible for retirement.<sup>20</sup> The Court of Appeals analyzed the meaning of “ser-

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compensation to a retirement or pension system where accumulated contributions are deducted on all earnable compensation, the member shall receive service credit in the system into which the member transfers for and in the amount of benefits accumulated in the system from which the member transfers. The transfer of credit shall occur upon the deposit, within 1 year of the member's transfer, of the total accumulated contributions to the member's credit in the annuity or other corresponding fund of the system from which the member transferred to the fund of the system into which the member transferred.

*Id.*

16. See Brief for Appellant at 405, *Morris* (No. 89-121).

17. See *id.* at 601-02, 573 A.2d at 1348.

18. *Id.* at 601, 573 A.2d at 1348.

19. See *Morris v. Prince George's County*, 317 Md. 609, 565 A.2d 1033 (1989).

20. See *Morris*, 319 Md. at 600, 573 A.2d at 1347. The court stated that the trial court judge improperly construed the section's meaning. See *id.* at 602-03, 573 A.2d at 1348-49. The trial judge acknowledged that elsewhere in article 73B, the phrase “creditable service” referred both to years of employment and the amount of monetary benefits earned. See *id.* at 602, 573 A.2d at 1348; MD. ANN. CODE art. 73B, § 11 (1989). But, when it interpreted the phrase “service credit” in section 32(a), the trial court concluded that the legislature intended only monetary benefits to be portable. See 319 Md. at 602, 573 A.2d at 1348. “There is nothing in Article 73B to indicate that [the bifurcated use of ‘creditable service’] was what the legislature had in mind. It is more reasonable to conclude that service credit can refer *either* to a credit of years toward retirement *or* to credit for purposes of determining amount of retirement allowance.” *Id.* (brackets and emphasis in original).

The Court of Appeals stated that the trial judge “violated the normal process of statutory construction by deleting from the statute the words ‘and in the amount of’ in order to support his interpretation.” *Id.* at 603, 573 A.2d at 1348. The judge also mis-

vice credit" and "benefits"—terms that the trial court considered crucial in interpreting section 32(a).<sup>21</sup> Although the statute's plain language is a starting point in determining its meaning, the court said it must look for the statute's general aim or policy.<sup>22</sup>

a. *The Meaning of "Service Credit" and "Benefits."*—The court first turned to article 73B for definitions. Although it found no express definition of "service credit," the court found that article 73B, section 1(10), used the similar phrase, "creditable service," which designated the way in which years of service are computed to determine retirement eligibility.<sup>23</sup> Also, the court found that in various code sections, "service credit" referred to years of service.<sup>24</sup> The court concluded that "creditable service" and "service credit" each refer to the number of years of employment counted to determine retirement eligibility.<sup>25</sup>

The court turned to ascertaining the meaning of "benefits."<sup>26</sup> Noting that in the dictionary,<sup>27</sup> and in article 73B,<sup>28</sup> the word broadly connotes "advantage," the court stated that the definition is not restricted to monetary payment.<sup>29</sup> But because elsewhere in article 73B "benefits" refers to mere monetary advantages,<sup>30</sup> the court

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applied the "plain language" rule, and did not accurately interpret the legislative history and purpose. *See id.*, 573 A.2d at 1349.

21. *See id.* at 604, 573 A.2d at 1349; *see also* *Morris v. Prince George's County*, No. CAL 87-11653, slip. op. at 5-7 (Cir. Ct. for Prince George's County, Apr. 27, 1989), vacated, 319 Md. 597, 573 A.2d 1356 (1990).

22. *See Morris*, 319 Md. at 603-04, 573 A.2d at 1349.

23. *See id.* at 605, 573 A.2d at 1349; MD. ANN. CODE art. 73B, § 1(10) (1988). "‘Creditable service’ shall mean prior service plus membership service for which credit is allowable." *Id.*

24. *See* 319 Md. at 605, 573 A.2d at 1349; *see also* MD. ANN. CODE art. 73B, § 9(4) (1988). "Prior service credit. — Upon verification of the statements of service the board of trustees shall credit to each member the service rendered prior to the date of the establishment of the retirement system." *Id.*; *see also* MD. ANN. CODE art. 73B, §§ 85, 115, 144 (1988) (considering the extent to which different types and periods of employment may apply toward eligibility for retirement).

25. *See* 319 Md. at 604, 573 A.2d at 1350.

26. *See id.*

27. *See id.* at 605-06, 573 A.2d at 1350; *see also* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 194 (2d ed. 1987) ("benefit" means "an advantage"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 204 (1976) (definition 2a states that "benefit" means "advantage, good"). *Compare id.* (definition 3a states that "benefit" means "a cash payment or service provided for under an annuity pension plan, or insurance policy").

28. *See* 319 Md. at 605-06, 573 A.2d at 1350.

29. *See id.*

30. *See id.* at 606-07, 573 A.2d at 1350-51; MD. ANN. CODE art. 73B, § 11(1)(a) (1988).

Any member may retire upon written application to the board of trustees set-

looked to the statute's legislative history to determine the section 32 meaning of "benefits," as well as "service credit."<sup>31</sup>

*b. Article 73B's Legislative History.*—The court began its search for legislative purpose and contextual meaning with the Maryland State Retirement System's formation in 1941.<sup>32</sup> Early provisions authorized transfers between retirement systems operated on an actuarial basis,<sup>33</sup> and stated that any person transferring into the new retirement system "shall receive prior service credit in the system to which he has transferred for all service rendered prior to January 1, 1926 . . . and membership service credit for all continuous service since January 1, 1926."<sup>34</sup>

The court found that the word "benefits" referred to both monetary benefits and service for eligibility,<sup>35</sup> and that prior service could be counted for retirement eligibility.<sup>36</sup>

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ting forth at what time he desires to be retired, provided that such member at the time so specified for his retirement shall have attained the age of sixty (60) or shall have rendered twenty-five (25) years of creditable service as an employee.

*Id.*; see also *id.* §§ 86, 117, 145 (using the term "benefits" in captions to refer to the time when an employee is eligible to retire).

31. See 319 Md. at 607, 573 A.2d at 1351.

32. See *Morris*, 319 Md. at 607, 573 A.2d at 1351; MD. ANN. CODE art. 73B, § 2 (1988). The MSRS first was amended in 1947. See Act of Apr. 25, 1947, ch. 664, 1947 Md. Laws 1638, 1638-39.

33. See Act of Apr. 25, 1947, ch. 664, 1947 Md. Laws 1638, 1638-39. Section 25, as enacted by chapter 664, states:

Any person who is a member of any retirement system, which is being operated on an actuarial basis, . . . either under the laws of this State or under the laws of any political sub-division of this State, may transfer his membership to any other such retirement system upon accepting office or employment which makes it possible or mandatory for him to participate in such other system and if such acceptance of office or employment would make it impossible for him to continue as a contributing member of the retirement system of which he has been a member.

*Id.* Section 25 is the predecessor of section 31.

34. MD. ANN. CODE art. 73B, § 26 (1947). Section 26 was section 32(a)'s predecessor.

35. See *Morris*, 319 Md. at 609, 573 A.2d at 1352; see also Act of Apr. 25, 1947, ch. 663, 1947 Md. Laws 1638:

AN ACT . . . providing for the transfer without loss of pension benefits by members of any retirement system operated on an actuarial basis under the laws of this State or any political sub-division thereof to any other retirement system operated on an actuarial basis under the laws of this state or any political subdivision thereof.

*Id.*

36. See Act of Apr. 25, 1947, ch. 664, 1947 Md. Laws 1638, 1640, which provides that "upon becoming a member of the retirement system to which he has transferred, such person shall . . . be eligible for such pension and annuity . . . including the credits for



Article 73B was again substantially revised in 1979.<sup>37</sup> The Pension System for Employees of the State of Maryland, eventually replaced the old Maryland State Retirement System,<sup>38</sup> and in the process, section 32 again was amended.<sup>39</sup> Prince George's County argued that the 1979 amendments confined benefits portability to monetary benefits.<sup>40</sup> The court rejected the County's argument on the ground that the 1979 Act's title makes plain that the legislature had no intent to change any benefits, including eligibility for retirement.<sup>41</sup>

The legislature again amended section 32 in 1981, expanding types of retirement systems between which transfers could be made.<sup>42</sup> In 1988, the legislature amended section 32, adopting the language now in dispute in *Morris*.<sup>43</sup>

The Court of Appeals quoted the State of Maryland's amicus curiae brief.<sup>44</sup> "For the last 42 years, the [Maryland State Retirement System] has credited members of its retirement systems with prior service in other retirement systems for the purpose of computing retirement eligibility."<sup>45</sup> The court concluded that this longstanding practice illustrated the administrative agency's construction of section 32(a), and this was entitled to deference.<sup>46</sup>

But the *Morris* court virtually ignored the fact that the Plan explicitly states that the employee must have been employed as a police officer in order to qualify for retirement. The Plan states that an employee can retire at age 55 or when he has "completed 20 years of Credited Service during all of which he was an Employee."<sup>47</sup> The Plan defines "Employee" as "any person employed by the County as a policeman."<sup>48</sup>

The court nevertheless held that "in light of the legislative pur-

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previous service in the retirement system from which he has transferred." *Id.* Section 27 was the predecessor of section 33.

37. See 319 Md. at 610, 573 A.2d at 1352.

38. See *id.*; see also MD. ANN. CODE art. 73B, § 112 (1988).

39. See Act of 1979, ch. 23, 1979 Md. Laws 70, 76.

40. See 319 Md. at 610, 573 A.2d at 1352-53.

41. See *id.* The court added that the amendments merely restated the prior language in a different form. See *id.*

42. See Act of May 12, 1981, ch. 394, 1981 Md. Laws 1782.

43. See Act of May 27, 1988, ch. 780, 1988 Md. Laws 5057.

44. See *Morris*, 319 Md. at 613, 573 A.2d at 1354.

45. Brief of the State of Maryland as Amicus Curiae at 2, 3, *Morris*, (No. 89-121).

46. 319 Md. at 613, 573 A.2d at 1354 (citing *Sinai Hosp. v. Department of Employment*, 309 Md. 28, 46, 522 A.2d 382, 391 (1987)).

47. Appendix for Appellees at 108, *Morris* (No. 89-121).

48. *Id.* (Note that "Participant" means "an Employee who participates in the Plan," whereas "Employee" means a "policeman." See *id.*).

pose of enhancing pension portability, section 32(a) permits an individual to carry over accumulated years of service for retirement eligibility when the individual transfers from one of the systems described in section 32(a) to another of those systems."<sup>49</sup>

3. *Analysis of the Morris Decision and the Subsequent Legislative Response.*—If the legislature had not acted quickly to establish separate provisions governing transfers into police and fire department pension systems,<sup>50</sup> the *Morris* decision would have meant that any State or County employee who transferred under article 73B's umbrella from one state retirement system to another could have transferred retirement eligibility credits earned in the former system. In the instant case, Morris and Olsen were able to count their respective eleven and eight years toward the Plan's twenty-year retirement requirement.<sup>51</sup>

Within days of the *Morris* decision, however, the State of Maryland amended section 32 by adding subsection (f).<sup>52</sup> Subsection 32(f)(2) states that the policies of the police or fire department pension system into which an individual transfers shall govern in determining:

(i) The years of service necessary to qualify the member for retirement from the retirement or pension system into which the member transfers; and

(ii) The years of service and amount of retirement benefits to be credited by the retirement or pension system into which the member transfers for the years of service and retirement benefits earned while a member of the retirement or pension system from which the member transfers.<sup>53</sup>

Thus, subsection 32(f) allows the transferee pension system's policies to determine whether years of service under the former sys-

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49. *Morris*, 319 Md. at 615, 573 A.2d at 1354.

50. See *infra* notes 52-57 and accompanying text.

51. Although this holding supports Morris's and Olsen's claim that they are entitled to count their years of service in the MSRS towards their retirement eligibility with the Plan, Morris and Olsen ultimately may lose their case. Under § 32(a), members must deposit within one year credit from their previous system into the new retirement system. See MD. ANN. CODE art. 73B, § 32(a) (Supp. 1990). Whether Morris and Olsen complied with this requirement is in dispute and will be subject to further investigation by the trial court on remand. See 319 Md. at 615-16, 573 A.2d at 1355.

52. See Act of May 29, 1990, ch. 609, 1990 Md. Laws 2655; 319 Md. at 614, 573 A.2d at 1354.

53. See MD. ANN. CODE art. 73B, § 32(f) (Supp. 1990); *supra* note 5.

tem are equivalent to years of service in the present system.<sup>54</sup> The amendment effectively overrules the Court of Appeals' decision with respect to transfers into police and fire departments.<sup>55</sup> By restricting the right to transfer service credits at will between the MSRS and police and fire department pension systems, the legislature eliminated the financial inequities inherent in such transfers,<sup>56</sup> and reinforced its support for agreements derived from the collective bargaining process.<sup>57</sup>

*a. Restores Financial Equity to Pension Systems.*—The *Morris* decision has substantial financial consequences. The police and fire department plans and the MSRS differ significantly in retirement eligibility, amount of employee contribution, and retirement benefits, and this makes inequitable a straightforward service credit transfer.<sup>58</sup>

One important difference is that some police and fire department retirement plans allow employees to retire earlier than employees who participate in the MSRS. For example, the Plan sets the normal retirement date at "the earlier of the date on which a Participant has attained age 55 or the date on which he has completed 20 years of Credited Service during all of which he was an Employee."<sup>59</sup> By contrast, the MSRS says that an employee must reach the age of sixty or render twenty-five years of service.<sup>60</sup> The Plan thus allows employees to retire five years earlier than they would be able to under the MSRS.

Another difference is that police and fire employees contribute significantly more money to the Plan. The Plan requires an employee to contribute eight percent of the employee's compensation each pay period.<sup>61</sup> Under the MSRS, the employee contribution

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54. *See id.*

55. The Court of Appeals was aware of this amendment when it decided *Morris*, but noted that, "[t]he fact that the General Assembly has prospectively adopted the policy advocated by the County is an added indication that current law, the law that applies to *Morris* and *Olsen*, is as we have stated it to be." 319 Md. at 614, 573 A.2d at 1354.

56. *See infra* notes 58-67 and accompanying text.

57. *See infra* notes 68-70 and accompanying text.

58. *See* Brief for Appellees at 22, *Morris* (No. 89-121) (estimating that each appellant would receive a windfall in excess of \$30,000); *see also infra* note 66.

59. PRINCE GEORGE'S COUNTY, MD., POLICE PENSION PLAN § 1 (1983); *see* Appendix for Appellees at 108, *Morris* (No. 89-121).

60. MD. ANN. CODE art. 73B, § 11(1)(a) (1988 & Supp. 1990).

61. *See* PRINCE GEORGE'S COUNTY, MD., POLICE PENSION PLAN § 7 (1983); *see also* Appendix for Appellees at 135. "Compensation" means "the basic compensation received by a Participant for services rendered by the Participant, excluding any overtime pay,

rate is only five percent of earned compensation.<sup>62</sup>

Finally, police and fire department employees receive greater annual compensation upon retirement. The Plan calculates annual retirement benefits as 2.5% of an employee's average annual compensation multiplied by her credited service up to a maximum of 20 years, plus 2% of her average annual compensation multiplied by the number of years of credited service in excess of 20 years.<sup>63</sup> The MSRS calculates its retirement allowance as one fifty-fifth (1.82%) of an employee's average final compensation, multiplied by the number of years of her creditable service.<sup>64</sup>

Although employees covered by the Plan receive more retirement benefits than do employees under the MSRS, Plan employees have contributed more money to the system during the course of their employment.<sup>65</sup> In this case, allowing Morris and Olsen to retire with full Plan benefits after contributing to it for only half their time as employees, would be allowing them to "buy" greater retirement benefits for a lesser contribution than that made by all other Plan employees.<sup>66</sup> The legislature's enactment of section 32(f) pre-

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bonuses, or other additional compensation." POLICE PENSION PLAN, *supra*, § 1; see Appendix for Appellees at 108.

62. See MD. ANN. CODE art. 73B, § 14(1)(a) (Supp. 1990). "Earnable compensation" means "the normal monthly compensation payable to an employee for working the normal time for the employee's position and that is equal to one-twelfth of the employee's annual salary rate." *Id.* § 1(14).

63. See PRINCE GEORGE'S COUNTY, MD., POLICE PENSION PLAN § 4(c) (1983); see also Appendix for Appellees at 120. Different formulae are listed for different retirement dates. See *id.* This formula applies to participants who retire on or after July 1, 1981. See *id.* "Average annual compensation" means "an amount computed by dividing by two the Compensation of a Participant during whatever period of twenty-four consecutive months of his Continuous Service will provide the largest total Compensation for any such period." POLICE PENSION PLAN, *supra*, § 1; see Appendix for Appellees at 107. "Credited service" means "all service of a Participant for which credit is given under this Plan for the purpose of computing any benefit provided by this Plan." POLICE PENSION PLAN, *supra*, § 1; see Appendix for Appellees at 108. Credited Service can total a maximum of 27 years, which includes 20 years of Continuous Service plus time served in MSRS. See POLICE PENSION PLAN, *supra*, § 1; see also Appendix for Appellees at 111.

64. See MD. ANN. CODE art. 73B, § 11(3)(a) (1988). If at the time of retirement, the employee has worked fewer than 30 years or is under 60 years old, his retirement allowance is reduced by 0.5% for every month short of these standards. See *id.* § 11(3)(a). This reduction compounds the difference in retirement eligibility between MSRS and the Plan. "Creditable Service" means "prior service plus membership service for which credit is allowable." *Id.* § 1(10). "Average Final Compensation" means "the average annual earnable compensation of an employee for the three years of service as an employee during which the employee's earnable compensation was highest, or if the employee had less than three years of service, then the employee's average earnable compensation for his or her total service." *Id.* § 1(15).

65. See *supra* notes 61-62 and accompanying text.

66. An explanatory hypothetical illustrates the consequences. Scenario 1: A police

vents this inequity.<sup>67</sup>

*b. Restores Integrity to the Collective Bargaining Process.*—The Plan originally required twenty-five years of service, but these were reduced to twenty on the condition that to be eligible for retirement an employee must complete all those years of actual service in the Prince George's County Police Department.<sup>68</sup> The reduction in the required years of service was the result of the 1979 Fraternal Order of Police (FOP) collective bargaining agreement.<sup>69</sup> Because the FOP is the exclusive bargaining unit, the *Morris* decision undermined the FOP's bargaining power.<sup>70</sup> By amending article 73B, section 32, the legislature returned the FOP's contract power.

*c. Restricts Pension Portability.*—As a result of the new legislation, the Plan will govern retirement eligibility of all future transferees to the police department. To qualify for full retirement benefits, an employee must complete twenty years of service as a Prince George's County police officer, or reach the age of fifty-five.<sup>71</sup> These twenty years are required in addition to any years the employee contributed to the MSRS or other State or local government pension plan prior to transferring to the Plan.<sup>72</sup> Although this has beneficial financial consequences for police and fire department

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or fire employee who works 25 years beginning at age 25, with a \$10,000 annual salary will contribute \$20,000 ( $.08 \times \$10,000 \times 25$  years) to the Plan (no interest accumulated or compounded). The employee's yearly retirement allowance will be \$6,000 ( $(.025 \times \$10,000 \times 20 \text{ years}) + (.02 \times \$10,000 \times 5 \text{ years})$ ). Scenario 2: An employee who has the same conditions as scenario 1, except that the employee contributes to the MSRS. The employee's contribution will be \$12,500 ( $.05 \times \$10,000 \times 25$  years), with a yearly retirement allowance of \$3182 ( $(1/55 \times \$10,000 \times 30 \text{ years})$ )—a 30% reduction because after only working 25 years, and only being age 45, the employee is 60 months away from the 30 years of service or 60 years of age goal, and loses 0.5% per month). Scenario 3: An employee with a \$10,000 annual salary works 10 years under the MSRS, transfers to the Plan and is allowed to retire after only 10 more years pursuant to the *Morris* ruling. The employee's contribution will have been \$13,000 (\$5000 from MSRS =  $.05 \times \$10,000 \times 10$  years; \$8000 from the Plan =  $.08 \times \$10,000 \times 10$  years). The employee's yearly retirement allowance will be \$5000 (if allowed to receive credit for all years served under the MSRS, the employee would receive full Plan retirement allowance:  $.025 \times \$10,000 \times 20 \text{ years} = \$5000$ ). Note, however, that the employee has contributed \$3000 less than someone who worked all 20 years in the Plan ( $.08 \times \$10,000 \times 20 \text{ years} = \$16,000$ ). Under § 32(f), this discrepancy is less likely to occur.

67. See *supra* notes 53-54 and accompanying text.

68. See Brief for Appellees at 25, *Morris* (No. 89-11).

69. See *id.*

70. See 319 Md. at 615 n.8, 573 A.2d at 1354-55 n.8.

71. See *supra* note 59 and accompanying text.

72. See PRINCE GEORGE'S COUNTY, MD., POLICE PENSION PLAN § 3 (1983); Appendix for Appellees at 111-19, *Morris* (No. 89-121).

pension plans, it will have detrimental effects on transferees. Under the new amendment, an individual who works and contributes to the MSRS for 19 years and 364 days, and then transfers to the Plan, could be required to work another 20 years, or to age 55, before achieving retirement eligibility.<sup>73</sup>

One important question left unanswered is how an employee's prior contributions to the MSRS are taken into account when the employee transfers into the Plan. A Plan representative stated that the contributions are actuarially accounted for, but nowhere is there an explicit formula.<sup>74</sup>

4. *Conclusion.*—As a result of the *Morris* decision and subsequent legislative action, Maryland employees who transfer from one job to another fall into two distinct pension categories: those transferring into police or fire departments, and those transferring elsewhere. For those who transfer elsewhere, the *Morris* decision applies. As long as both pension systems satisfy section 32(a) actuarial requirements, all years credited in the former pension system must be credited in the new system, both for monetary benefits and for determining retirement eligibility.

But those transferring into police and fire department pensions face another situation. Section 32(f) mandates that the police or fire department pension plan rules govern the date of retirement eligibility. Consequently, an employee could face doubling his working years before reaching retirement. Also, although monetary benefits must be given credit, as yet there are no explicit rules stating how this is to be done.

#### B. *Abusive Discharge and Whistle-Blowing Managers*

In *Chappell v. Southern Maryland Hospital, Inc.*,<sup>75</sup> the Court of Appeals held that a tort action for wrongful or abusive discharge<sup>76</sup> will not lie if the discharge violates a public policy expressed in statutes carrying their own remedies.<sup>77</sup> The court reiterated its recent deci-

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73. See Brief for Appellants at 5-6, *Morris* (No. 89-121). Such an employee would have been required only to work an additional five years under MSRS to qualify for retirement. See *supra* note 60 and accompanying text.

74. See Appendix for Appellees at 95.

75. 320 Md. 483, 578 A.2d 766 (1990).

76. See *infra* notes 105-125 and accompanying text for further discussion of this tort action's history and application. Courts have interchangeably labelled the tort "wrongful," "abusive," or "retaliatory" discharge.

77. See 320 Md. at 493, 578 A.2d at 772.

sion in *Makovi v. Sherwin-Williams Co.*,<sup>78</sup> in which it held that "[a]busive discharge is inherently limited to remedying only those discharges in violation of a clear mandate of public policy which otherwise would not be vindicated by a civil remedy."<sup>79</sup> The court concluded that the antidiscrimination statutes implicated by Chappell's suit, including title VII of the Civil Rights Act of 1964<sup>80</sup> and Maryland article 49B,<sup>81</sup> as well as the federal Fair Labor Standards Act (FLSA),<sup>82</sup> provide exclusive administrative remedies for violations.<sup>83</sup> An at-will employee may not seek compensatory or punitive

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78. 316 Md. 603, 561 A.2d 179 (1989).

79. *Id.* at 605, 561 A.2d at 180.

80. See 42 U.S.C. §§ 2000e to 2000e-17 (1988). Title VII provides relief for victims of employment discrimination based on race, color, religion, sex, or national origin. See *id.*

81. See MD. ANN. CODE art. 49B, §§ 14-18 (1986). The "Maryland Fair Employment Practices Law," enacted in 1965, was a direct response to title VII's enactment. See *Makovi*, 316 Md. at 607, 561 A.2d at 181. Section 14 of the Act provides that the State's public policy is "to assure all persons equal opportunity in receiving employment and in all labor management-union relations regardless of race, color, religion, ancestry or national origin, sex, age, marital status, or physical or mental handicap unrelated in nature and extent so as to reasonably preclude the performance of the employment." MD. ANN. CODE art. 49B, § 14 (1986).

82. See 29 U.S.C. §§ 201-219 (1988) (establishing minimum wage and hour standards). The FLSA was enacted in response to "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *Id.* § 202(a). The FLSA's policy is "to correct and as rapidly as practicable to eliminate the[se] conditions." *Id.* § 202(b).

83. Title VII established the Equal Employment Opportunity Commission (EEOC) "to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3." 42 U.S.C. § 2000e-5(a) (1988). Title VII remedies include injunctions and any other affirmative action "which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate." *Id.* § 2000e-5(g). Back pay may be collected for as long as two years from the charge's filing. See *id.*

Article 49B remedies parallel the title VII remedies. Article 49B established the Maryland Human Relations Commission (HRC) to investigate unlawful employment practices. See MD. ANN. CODE art. 49B, § 1(a) (1986). If an employer engages in an unlawful employment practice, "the remedy may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief that is deemed appropriate." *Id.* § 11(e). A 1989 amendment extended back pay from two years to thirty months. See MD. ANN. CODE art. 49B, § 11(e) (Supp. 1990).

The Fair Labor Standards Act created a Wage and Hour Division within the Department of Labor. See 29 U.S.C. § 204(a) (1988). The Act also designated minimum wage rates, maximum hours, and overtime pay rates. See *id.* §§ 206-07. When an employer violates minimum wage and maximum hour laws, it may be liable to employees "in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." *Id.* § 216(b). Remedies available for an employer's retaliatory action against the employee for reporting Act violations include "such legal or equitable relief as may be appropriate . . . including without limitation employment, reinstatement, promotion, and the payment of wages lost and an

damages by bringing a tort action for abusive discharge if statutory remedies exist.<sup>84</sup>

This Note discusses *Chappell*'s significance and argues that it was incorrectly decided. First, the majority failed to address Chappell's claim that he should be allowed to seek recovery through a common law action because he was excluded from the protection of the Maryland Minimum Wage Act, the state's version of the FLSA.<sup>85</sup> Second, despite the absence of clear legislative intent to make antidiscrimination statutory remedies exclusive, the court nonetheless presumed that it intended exclusivity.<sup>86</sup> In fact, the legislative history, particularly of title VII, reflects an intent to preserve alternative remedies for victims of employment discrimination.<sup>87</sup> Finally, in presuming that the statutory remedies are exclusive, the court failed to analyze critically the underlying substantive policies of the antidiscrimination and minimum wage and hour laws at stake in *Chappell*. The court failed to give full effect to the important legislative purpose behind the statutes, and impeded the growth of a common law tort theory that would complement legislative expressions of public policy.

1. *The Case*.—On November 23, 1988, Robert L. Chappell filed suit in the Circuit Court for Prince George's County against Southern Maryland Hospital (SMH) seeking compensatory and punitive damages for his alleged "unjust discharge."<sup>88</sup> Chappell stated that SMH employed him on an at-will basis as Director of Personnel

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additional equal amount as liquidated damages." *Id.* See *infra* note 103 for the text of the FLSA's "whistle-blowing" provision.

84. *Chappell*, 320 Md. at 493, 578 A.2d at 772.

85. See *infra* notes 127-133 and accompanying text.

86. The *Chappell* court did not specifically address legislative intent, but borrowed heavily from its analysis of this subject in *Makovi*. There, the court relied on several United States Courts of Appeals decisions and concluded that title VII does not permit compensatory or punitive tort damages for prohibited employment discrimination. See 316 Md. 603, 623, 561 A.2d 179, 189; see also *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977); *Pearson v. Western Elec. Co.*, 542 F.2d 1150 (10th Cir. 1976); *Russell v. American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *vacated and remanded on other grounds*, 431 U.S. 951 (1977).

The *Makovi* court also pointed to the Maryland General Assembly's rejection of proposed amendments to article 49B that would have provided compensatory damages for employment discrimination. See 316 Md. at 624-26, 561 A.2d at 189-90. But see *infra* note 137 and accompanying text for the *Makovi* dissent's interpretation of the General Assembly's actions.

87. See *infra* note 136 and accompanying text.

88. *Chappell*, 320 Md. at 485, 578 A.2d at 768.



from July 1984 to December 1985.<sup>89</sup> He alleged that during his employment, he discovered personnel practices that he believed were unlawful under state and federal employment laws. These practices included sexual harassment of female employees, violations of state and federal wage and hour laws, and racially discriminatory hiring practices.<sup>90</sup>

Chappell's complaint alleged that on numerous occasions he attempted to advise SMH management of these illegal practices, but that "no action was taken."<sup>91</sup> After Chappell documented the violations and sent memoranda to top management, several SMH employees told Chappell that he was being set up for dismissal.<sup>92</sup> On December 17, 1985, SMH fired Chappell.<sup>93</sup> Chappell alleged that his discharge was wrongful because it was caused by "his insistence that the Hospital abide by the clear letter and spirit of the law[]." <sup>94</sup>

SMH moved to dismiss Chappell's complaint for failure to state a claim upon which relief could be granted. SMH argued that Chappell's complaint asserted no more than that the hospital was displeased that he raised allegations of unlawful conduct, and consequently discharged him.<sup>95</sup> It argued that firing Chappell for this reason did not contravene a specific provision of Maryland public policy, and therefore could not support a tort action for wrongful discharge.<sup>96</sup> SMH also claimed that the wrongful discharge action could not lie in any event because exclusive statutory remedies existed to vindicate the public policy violations alleged in Chappell's

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89. *Id.* Chappell's job entailed implementing all of SMH's employment-related policies. *Id.*

90. *Id.* at 486, 578 A.2d at 768.

91. *See id.*

92. *Id.* According to Chappell, his immediate supervisor told him "that it appeared that he [Chappell] would be set up as a result of the action on his part." *Id.* Chappell also discussed the problems with SMH's legal counsel and was advised "that his assessment of the situation was correct, but that it was doubtful that any action would be taken." *Id.*

93. *Id.* According to Chappell, he never officially was told that his job was in jeopardy, he received an excellent job evaluation just four months before he was fired, and when he was fired, he was not given any reason. *See id.* at 486-87, 578 A.2d at 768.

94. *Id.* at 487, 578 A.2d at 768.

95. *See id.* at 487-88, 578 A.2d at 769.

96. *See id.* at 488, 578 A.2d at 769. SMH relied on the court's decision in *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981), *answer conformed to*, 538 F. Supp. 572 (D. Md. 1982), *aff'd in part and rev'd in part*, 830 F.2d 1303 (4th Cir. 1987). *See Chappell*, 320 Md. at 488, 578 A.2d at 769. In *Adler*, the court dismissed Adler's complaint for wrongful discharge because he failed to allege sufficiently that his discharge violated any legislative enactment, judicial decisions, or state regulations, and hence did not violate the state's public policy. *See* 291 Md. at 43-47, 432 A.2d at 470-73.

complaint.<sup>97</sup>

The Circuit Court granted SMH's motion to dismiss.<sup>98</sup> The Court of Appeals granted certiorari,<sup>99</sup> and affirmed the lower court's decision.<sup>100</sup> The court rejected Chappell's argument that the antidiscrimination statutes and minimum wage statutes were inapplicable because he was discharged for his conduct, rather than his "status."<sup>101</sup> Instead, the court noted that the Maryland and federal antidiscrimination statutes, as well as the federal minimum wage and hour law, make it unlawful to discriminate against an employee for "whistleblowing"<sup>102</sup> on his employer.<sup>103</sup> The court con-

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97. See 320 Md. at 488, 578 A.2d at 769. SMH pointed to the Maryland Fair Employment Practices Law prohibiting employment discrimination based upon, among other things, sex and race. See MD. ANN. CODE art. 49B, § 14 (1986), and the Maryland Minimum Wage Act, which proscribes the alleged wage and hour violations. See *id.* art. 100, §§ 55A-93A (1985). SMH also argued, however, that because Chappell was a management employee, he was excluded from the state Minimum Wage Act's protection. See 320 Md. at 488, 578 A.2d at 769. Therefore, SMH argued, his discharge did not violate any provision of Maryland public policy. See *id.*

98. *Chappell*, 320 Md. at 488, 578 A.2d at 769.

99. See *id.* Certiorari was granted upon Chappell's appeal to the Maryland Court of Special Appeals. See *id.*

100. See *id.* at 497, 578 A.2d at 774.

101. See *id.* at 491-92, 578 A.2d at 771. Chappell sought to distinguish his case from *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 561 A.2d 179 (1989). *Makovi* involved an at-will employee of a paint factory who was fired because she was pregnant. See *id.* at 605, 561 A.2d at 180. The *Makovi* court struck the plaintiff's claim for a tort of abusive discharge, noting that title VII and article 49B of the Maryland Code already provide remedies for sex discrimination. See *id.* at 626, 561 A.2d at 190. Chappell argued that he did not assert, as *Makovi* did, that he was a victim of race or sex discrimination, nor were his rights violated under wage and hour laws. See 320 Md. at 491, 578 A.2d at 771. Rather, his conduct in identifying problems at SMH caused his employment termination. See *id.*

102. "Whistle-blowing" is one of the unlawful motives for discharging an employee for which courts have developed and applied the public policy exception to the at-will employment doctrine. See *infra* note 115 and accompanying text.

103. See 320 Md. at 494-95, 578 A.2d at 772-73. The Maryland Fair Employment Practices Law provides:

It is an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subtitle or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subtitle.

MD. ANN. CODE art. 49B, § 16(f) (1986).

In this respect, article 49B is closely modeled on section 2000e-3(a) of the Civil Rights Act, which makes it unlawful for an employer to discriminate against an employee either "because he has opposed any practice made an unlawful employment practice" under title VII (the opposition clause), or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" (the participation clause). 42 U.S.C. § 2000e-3(a) (1988).

Similarly, FLSA makes it unlawful "to discharge or in any other manner discrimi-

cluded that the availability of a statutory civil remedy precluded Chappell from seeking a tort remedy for abusive discharge.<sup>104</sup>

2. *Legal Background.*—Under Maryland common law, an employee hired for an indefinite period was considered an at-will employee.<sup>105</sup> In such cases, either party could terminate the employment contract at any time for “good cause, bad cause, or no cause at all.”<sup>106</sup>

Recent federal and state legislation curtails the common law at-will doctrine by providing greater protections to at-will employees. Some of the most protective federal statutory schemes include FLSA and title VII.<sup>107</sup> Article 49B of the Maryland Code, the state antidiscrimination statute, closely parallels title VII’s language,<sup>108</sup> and article 100, the state minimum wage and hour law, mirrors the FLSA.<sup>109</sup> Additionally, several federal enactments prohibit employer retaliation against employees who report violations of the statutes.<sup>110</sup> Various Maryland statutes also contain whistle-blowing provisions.<sup>111</sup>

In the wake of these protective legislative enactments, the judiciary recognized that employers’ at-will defense was eroding. Courts used both tort and contract theories to afford relief to at-will

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nate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding.” 29 U.S.C. § 215(a)(3) (1988).

104. See 320 Md. at 493, 578 A.2d at 772.

105. See *Vincent v. Palmer*, 179 Md. 365, 19 A.2d 183 (1941); *Washington B. & A.R. Co. v. Moss*, 127 Md. 12, 21, 96 A. 273, 276 (1915).

106. *NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956).

107. See *supra* notes 80, 82-83. Other federal legislative enactments protecting employee rights include: National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1988) (guaranteeing employee freedom to organize unions, bargain collectively, and engage in other concerted activity); Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1988) (prohibiting employment discrimination because of age); Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 794 (1988) (prohibiting employment discrimination against those with physical or mental handicaps by recipients of federal financial assistance).

108. Compare Md. ANN. CODE art. 49B, § 14 (1986) with 42 U.S.C. §§ 2000e to 2000e-17 (1982); see *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 607, 561 A.2d 179, 181 (1989).

109. Compare Md. ANN. CODE art. 100, §§ 55A-93A (1985) with 29 U.S.C. §§ 201-219 (1988).

110. See *supra* note 103 and accompanying text. For a list of other federal regulatory statutes that include provisions preventing retaliatory firings of employees who report violations of the statutes, see Greenbaum, *Toward a Common Law of Employment Discrimination*, 58 TEMP. L.Q. 65, 67 n.10 (1985).

111. See *supra* note 103 for the text of article 49B’s whistle-blowing provision, and *infra* note 130 for the Maryland Minimum Wage Act’s whistle-blowing provision; see also Md. ANN. CODE art. 89, § 43 (1985) (employee may not be discharged for trying to enforce Maryland’s Occupational Safety and Health Act).

employees whose terminations violated either public policy,<sup>112</sup> implied covenants of good faith and fair dealing,<sup>113</sup> or implied contract covenants of job security.<sup>114</sup> Most jurisdictions have adopted the "public policy exception," which allows an employee to recover damages from his employer if he is fired for reasons that undermine public policy.<sup>115</sup> When a state or federal statute defines the public policy and provides a remedy for its violation, the question arises whether a tort action for wrongful discharge is a permissible alternative remedy.<sup>116</sup>

A majority of courts hold that a common law tort is barred if an employer's action is prohibited by a statute already conferring a remedy.<sup>117</sup> The minority view acknowledges the importance of the legislature's administrative procedures and statutory remedies, but recognizes alternative tort remedies in the absence of specific legislative intent to make statutory remedies exclusive.<sup>118</sup>

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112. See, e.g., *Peterman v. International Bd. of Teamsters, Local 396*, 174 Cal. App. 2d 184, 188-90, 344 P.2d 25, 27-28 (Ct. App. 1959) (discharging an employee for refusing to give false testimony is against public policy); *Palmetteer v. International Harvester Co.*, 85 Ill. 2d 124, 133, 421 N.E.2d 876, 880 (1981) (cause of action in tort upheld where employee was discharged for providing information to police for use against another employee); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 252-53, 297 N.E.2d 425, 428 (1973) (discharging employee for filing workmen's compensation claim warrants a tort action); *Nees v. Hocks*, 272 Or. 210, 219, 536 P.2d 512, 516 (1975) (discharge of employee for serving on jury against employer's wishes is actionable in tort); *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 276 (W. Va. 1978) (cause of action upheld for employee discharged for attempts to require bank to comply with consumer credit law).

113. See, e.g., *Fortune v. National Cash Register Co.*, 373 Mass. 96, 104-06, 364 N.E.2d 1251, 1255-56 (1977) (firing salesman to avoid paying him a commission violated an implied covenant of good faith with an at-will employee); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 133, 316 A.2d 549, 551 (1974) (firing an at-will employee in bad faith constituted a breach of the employment contract).

114. See, e.g., *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 465-66, 443 N.E.2d 441, 445, 457 N.Y.S.2d 193, 197 (1982) (certain provisions of the employment application and the personnel manual are part of the employment contract).

115. See Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1931-32 (1983). In determining a state's public policy, a court may look to legislative enactments, prior judicial decisions, or administrative regulations, although it usually is the legislature's function to declare public policy. See *Adler v. American Standard Corp.*, 291 Md. 31, 45, 432 A.2d 464, 472 (1981), *answer conformed to*, 538 F. Supp. 572 (D. Md. 1982), *aff'd in part and rev'd in part*, 830 F.2d 1303 (4th Cir. 1987).

116. See, e.g., *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 561 A.2d 179 (1989) (employee brought a wrongful discharge action against an employer, alleging that she was discharged because of her pregnancy).

117. See Survey, *Limiting the Tort of Abusive Discharge, Developments in Maryland Law, 1988-89*, 49 MD. L. REV. 702, 707 n.131 (1990), for a list of cases representing the majority view on the tort for wrongful discharge.

118. See, e.g., *Savage v. Holiday Inn Corp.*, 603 F. Supp. 311, 313-14 (D. Nev. 1985)

In *Adler v. American Standard Corp.*,<sup>119</sup> the Maryland Court of Appeals, on a question of law certified from the United States District Court for the District of Maryland, recognized a cause of action for abusive discharge of an at-will employee "when the motivation for the discharge contravenes some clear mandate of public policy."<sup>120</sup> Later, in *Ewing v. Koppers Co.*,<sup>121</sup> the court extended the tort action to contractual employees<sup>122</sup> to "foster the state's interest in deterring particularly reprehensible conduct."<sup>123</sup> But in *Makovi*, the court severely limited the tort's application: no abusive discharge remedy would lie if the public policy violation was proclaimed by a statute providing its own remedy.<sup>124</sup> The *Chappell* court used this reasoning to support dismissing Chappell's abusive discharge claim.<sup>125</sup>

3. *Analysis.*—*Chappell* does little more than affirm the court's recent holding in *Makovi*. But *Chappell* was incorrectly decided on its facts and on larger policy grounds. As the dissent noted, the court should have allowed Chappell to bring a common law action because he was excluded from the Maryland Minimum Wage Act's protection.<sup>126</sup>

Chappell's claim for wrongful discharge rested in part on his belief that he was fired for reporting SMH's violations of federal and state wage and hour laws.<sup>127</sup> The majority argued that he was precluded from bringing a common law action in tort<sup>128</sup> because the FLSA makes it unlawful for an employer to discriminate against an

(age and sex discrimination); *McKinney v. National Dairy Council*, 491 F. Supp. 1108, 1121-22 (D. Mass. 1980) (age discrimination); *Broomfield v. Lundell*, 159 Ariz. 349, 355, 767 P.2d 697, 703 (Ct. App. 1988) (sex discrimination); *Holmes v. Haughton Elevator Co.*, 404 Mich. 36, 41-42, 272 N.W.2d 550, 551 (1978) (age discrimination); *Holien v. Sears, Roebuck & Co.*, 298 Or. 76, 90-91, 689 P.2d 1292, 1299-1300 (1984) (sex discrimination).

119. 291 Md. 31, 432 A.2d 464 (1981).

120. *Id.* at 47, 432 A.2d at 473.

121. 312 Md. 45, 537 A.2d 1173 (1988).

122. *See id.* at 49, 537 A.2d at 1. In *Ewing*, a former employee brought an abusive discharge action alleging he was fired in retaliation for filing a worker's compensation claim. *See id.* at 47, 537 A.2d at 1174. The court found that the wrongful discharge tort's public policy component applies equally to employees under contract. *See id.* at 49, 537 A.2d at 1175.

123. *Id.*

124. *See* 316 Md. 603, 626, 561 A.2d 179, 190 (1989); *supra* note 86 and accompanying text.

125. *See* 320 Md. at 493, 578 A.2d at 772.

126. *See id.* at 503, 578 A.2d at 776 (Adkins, J., dissenting).

127. *See id.* at 487, 578 A.2d at 768.

128. *See id.* at 493, 578 A.2d at 772.

employee for reporting violations of the Act, and provides its own remedies.<sup>129</sup> But Maryland's Minimum Wage Act excludes Chappell from the protection of its whistle-blowing provision because he held an administrative position.<sup>130</sup> The existence and language of the provision, however, express a clear public policy to protect those who act for the public good in reporting violations of state minimum wage and hour laws.<sup>131</sup> Therefore, under *Makovi*, "the generally accepted reason for recognizing the tort, that of vindicating an otherwise civilly unremedied public policy violation,"<sup>132</sup> applies to Chappell's claim. He should have been allowed to sue in tort for abusive discharge.<sup>133</sup>

The legislative intent to preserve or preclude alternative remedies is a larger issue governing the majority's decision in *Chappell*.<sup>134</sup> The majority adopted the view expressed in *Makovi* that the antidiscrimination statutes' remedies are preemptive, and thus preclude judicially created tort remedies.<sup>135</sup> But the legislative history of the antidiscrimination statutes, especially title VII, evidences congres-

129. See *supra* notes 83 and 103 and accompanying text.

130. See Md. ANN. CODE art. 100, § 89(b) (1985), which penalizes

[a]ny employer who discharges any employee because such employee has made any complaint to his employer, to the Commissioner [of the Division of Labor and Industry] or his authorized representative, that he has not been paid wages in accordance with the provisions of the subtitle, or because such employee has instituted any proceeding under or related to this subtitle, or because such employee has testified in any such proceeding.

*Id.* But the Act excepts from the definition of "employee" any "individual employed in a bona fide executive, administrative, or professional capacity." This definition would exclude Chappell. See *id.* § 82(e)(2).

131. See *id.*

132. 316 Md. 603, 626, 561 A.2d 179, 190 (1989).

133. SMH argued that because Chappell was excluded from the protection of the Maryland Minimum Wage Act, public policy considerations were not implicated. See 320 Md. at 488, 578 A.2d at 769. Arguably the majority simply accepted this argument on its face, because it did not discuss the Act's application to Chappell's claim.

134. The court in *Chappell* did not discuss the role of legislative intent in determining whether the statutory remedies at stake were exclusive. The court, however, had already analyzed legislative intent in *Makovi*. See 316 Md. at 621-26, 561 A.2d at 188-90. Therefore, the majority relied heavily on its *Makovi* decision in upholding its conclusion that the statutory remedies provided were exclusive. See *Chappell*, 320 Md. at 497, 578 A.2d at 774.

135. See *Makovi*, 316 Md. at 621, 561 A.2d at 188. Addressing the exclusivity of remedies under title VII, the *Makovi* court acknowledged congressional policy that nothing in title VII "shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State." *Id.* The court concluded that the decision whether to recognize a new tort is made by each state judiciary "in light of relevant policy determinations made by the [legislative branch]." *Id.* at 622, 561 A.2d at 188 (quoting *Bush v. Lucas*, 462 U.S. 367, 373 (1983)).

sional desire to preserve alternative remedies.<sup>136</sup> Similarly, nothing in article 49B's legislative history suggests legislative intent to preclude a common-law tort remedy.<sup>137</sup>

The court's deference to legislative remedies is questionable in light of the positive role the court could play in enforcing the policies expressed in the whistle-blowing provisions. Generally, the courts have applied these provisions liberally to shield employees who report violations.<sup>138</sup> The underlying rationale is that "without some guaranteed protection to assert equal employment rights, the ultimate purpose of the act would be severely limited."<sup>139</sup> In

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136. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-49 (1974) (summarizing title VII's legislative history and demonstrating the compatibility of its remedies with non-statutory remedies); see also Herbert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U. L. REV. 449 (1971) (discussing the relationships of various remedies for employment discrimination claims); cf. *Patterson v. McClean Credit Union*, 109 S. Ct. 2363, 2376 (1989) (refusing to extend 42 U.S.C. § 1981 to cover a racial harassment claim because it would "federalize" matters traditionally covered by state common law").

137. See 320 Md. at 499-500, 578 A.2d at 775 (Adkins, J., dissenting). In *Makovi*, Judge Adkins outlined his argument concerning the nonexclusivity of article 49B remedies. First, article 49B's employment provisions are closely modeled on those of title VII. See 316 Md. at 630, 561 A.2d at 192; *Burnett v. Grattan*, 468 U.S. 42, 51 (1984). Second, title VII's legislative history indicates that Congress did not intend its remedies to be exclusive. See 316 Md. at 632, 561 A.2d at 193; *infra* note 141 and accompanying text. Third, the dissent noted Court of Appeals' decisions suggesting that article 49B's remedial scheme is not comprehensive. See 316 Md. at 639, 561 A.2d at 197; see, e.g., *Maryland-National Capital Park & Planning Comm'n v. Crawford*, 307 Md. 1, 26, 511 A.2d 1079, 1092 (1986) (the plaintiff was not required to exhaust her remedies under article 49B before the HRC); see also *Burnett v. Grattan*, 468 U.S. 42, 53 (1984) (recognizing the limited remedial authority of the HRC pursuant to article 49B). Finally, in the dissent's view, the General Assembly's failure to pass provisions allowing full tort damages under article 49B may be attributed to objections to other portions of the proposed bills, and a reluctance to allow an administrative agency to award tort damages. See 316 Md. at 642, 561 A.2d at 198; see also *Recent Cases*, *Makovi v. Sherwin-Williams*, 109 HARV. L. REV. 1732, 1735-36 (1990) (including additional legislative history arguments against *Makovi*).

138. See, e.g., *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012-13 (9th Cir. 1983) (letter protesting unspecified "racism" and "discrimination" in employer's practices is permissible form of protected opposition); *Armstrong v. Index Journal Co.*, 647 F.2d 441, 448-49 (4th Cir. 1981) (female employee who was discharged because she complained to employer about sex discrimination was entitled to reinstatement with back pay and salary equal to her male counterparts', court costs, and attorney's fees); *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980) ("By protecting employees from retaliation, [§ 2000e-3(a)] is designed to encourage employees to call to their employers' attention discriminatory practices of which the employer may be unaware or which might result in protracted litigation to determine their legality if they are not voluntarily changed."); *Jenkins v. Orkin Exterminating Co., Inc.*, 646 F. Supp. 1274, 1278 (E.D. Tex. 1986) (§ 2000e-3(a) protects an employee fired for complaining to the manager that a fellow employee was experiencing sexual harassment).

139. *Chappell*, 320 Md. at 494, 578 A.2d at 772.

presuming exclusivity in the absence of legislative intent, courts fail to effectuate fully the legislative policy in protecting whistle-blowers.<sup>140</sup> "The availability of a common law tort remedy supplements rather than hinders the goals of the statutes."<sup>141</sup>

Determining the court's proper role in formulating common law remedies that parallel statutory remedies necessitates using a predictable test that balances the relationship between the two approaches.<sup>142</sup> One test, modeled on the Supreme Court's proposed test in *Cort v. Ash*,<sup>143</sup> would involve examining the following four factors: (1) whether the plaintiff is in the class the statute seeks to benefit; (2) whether there is conclusive evidence of legislative intent to foreclose recognizing parallel common law remedies; (3) whether recognizing parallel common law remedies furthers the legislative scheme's public policy; and (4) whether the claim's subject matter is traditionally relegated to common law.<sup>144</sup> Although the Supreme Court of late has been unreceptive to claims of private causes of action—it demands affirmative evidence of legislative intent to create private remedies—Maryland courts could use this analysis to facilitate examination of alternative remedies absent legislative intent to the contrary.<sup>145</sup> By encouraging the judiciary to carefully ex-

140. See *id.* at 500, 578 A.2d at 775 (Adkins, J., dissenting).

141. *Id.* Common law remedies should be available because statutory remedies often fail to capture the personal nature of the injury done to a wrongfully discharged employee[e]. . . . Reinstatement, back pay, and injunctions [may] vindicate the rights of the victimized group without compensating the plaintiff for such personal injuries as anguish, physical symptoms of stress, a sense of degradation, and the cost of psychiatric care. [In such cases,] [l]egal as well as equitable remedies are needed to make the plaintiff whole.

*Holiens v. Sears, Roebuck and Co.*, 298 Or. 76, 97, 689 P.2d 1292, 1303-04 (1984).

142. See Greenbaum, *supra* note 110, at 105.

143. 422 U.S. 66 (1975). In *Cort*, the Supreme Court developed a four-part test to determine whether a private right of action based on a federal statute should be implied if the statute fails on its face to provide such a remedy. See *id.* at 78. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and subsequent cases have called into question *Cort*'s liberal approach to implied causes of action. See *Thompson v. Thompson*, 108 S. Ct. 513, 521 (1988) (Scalia, J., concurring).

144. See Greenbaum, *supra* note 110, at 106.

145. The test would also serve to (1) produce a result more responsive to the legislature's policy considerations, (2) provide more flexible and effective remedies through application of contract and tort theories, (3) make state courts more attractive forums in which to bring claims, and (4) enhance the judiciary's role in creating a dialogue with the legislature concerning the strengths and weaknesses of the relevant statutory remedies. See Greenbaum, *supra* note 110, at 109-11. See also Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385-86 (1908) (criticizing judicial reluctance to use statutory policy in developing common law rules); Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554, 558 (1982) (calling for more assimilation into the common law of statutory policies).



amine underlying statutory policy goals, this analysis would more fully effectuate state and federal legislative public policy.

4. *Conclusion.*—On two occasions the Court of Appeals narrowly interpreted its holding in *Adler* that a tort action for abusive discharge will lie when the motivation for the discharge violates public policy. In *Makovi* and *Chappell*, the court ironically “makes the statutes that establish the public policy, allegedly contravened here . . . the means of depriving [the plaintiff] of the benefits of an abusive discharge action.”<sup>146</sup> As a result of these holdings, the court has moved further away from giving greater substance to the public policies expressed in the antidiscrimination and minimum wage and hour laws.

SHARON L. TASMAN  
MARGARET A. JACOBSEN

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146. 320 Md. at 501, 578 A.2d at 775 (Adkins, J., dissenting) (citing *Makovi*, 316 Md. at 630, 561 A.2d at 192 (Adkins, J., dissenting)).

## VI. EVIDENCE

### A. *The Res Ipsa Loquitur Doctrine and Medical Malpractice Cases*

In *Meda v. Brown*,<sup>1</sup> the Court of Appeals held that expert testimony in a medical malpractice case that rested in part on inferences, sufficiently established against the defendant a prima facie case of negligence.<sup>2</sup> The Court of Appeals rejected the Court of Special Appeals'<sup>3</sup> application of *res ipsa loquitur*,<sup>4</sup> instead drawing a distinction between "the question of whether an inference may be drawn by an expert [and] . . . whether an inference may be drawn by a layman."<sup>5</sup> The Court of Appeals based its decision on the sufficiency of the expert's testimony rather than on a finding of *res ipsa loquitur*, and in so doing, clarified two areas of Maryland tort law. First, the court made it clear that the doctrine of *res ipsa loquitur* does not apply where expert testimony is necessary in a medical malpractice case,<sup>6</sup> foreclosing the doctrine's use in all but the most obvious malpractice situations. Second, the court said that even when a jury would not be permitted to infer negligence from circumstantial evidence, an expert witness could draw such an inference without the inference being characterized as mere "speculation or conjecture."<sup>7</sup> Although the Court of Appeals refused to apply the *res ipsa loquitur* doctrine to ordinary medical malpractice cases in Maryland, it achieved the same result by permitting an expert witness to draw a similar inference of negligence based on circumstantial evidence.

1. *The Case*.—On February 11, 1980, plaintiff Dorothy Virginia Brown entered Sinai Hospital in Baltimore for bilateral breast biopsy surgery.<sup>8</sup> The surgery, performed under general anesthesia, began shortly before noon and lasted approximately two hours. Ms.

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1. 318 Md. 418, 569 A.2d 202 (1990).

2. *Id.* at 420, 569 A.2d at 203.

3. *See Brown v. Meda*, 74 Md. App. 331, 537 A.2d 635 (1988), *aff'd*, 318 Md. 418, 569 A.2d 202 (1990).

4. *See Meda*, 318 Md. at 420, 569 A.2d at 203. For an explanation of the *res ipsa loquitur* doctrine, see *infra* notes 31-34 and accompanying text.

5. *Id.* at 428, 569 A.2d at 206-07.

6. *See id.* at 425, 428, 569 A.2d at 205, 207.

7. *Id.* at 427, 569 A.2d at 206.

8. *Brown v. Meda*, 74 Md. App. 331, 333, 537 A.2d 635, 636 (1988), *aff'd*, 318 Md. 418, 569 A.2d 202 (1990).

Brown remained in the recovery room for another three hours.<sup>9</sup> At approximately 4:45 p.m., while still "groggy" and unaware of her surroundings, she was transferred from the recovery room to the ward.<sup>10</sup> The next morning, Ms. Brown noticed pain, tingling, and numbness in her right hand, particularly her fourth and fifth fingers.<sup>11</sup>

Ms. Brown's condition was diagnosed as an injury to the ulnar nerve, which extends from the shoulder into the hand, and provides motor and sensory functions to the fourth and fifth fingers.<sup>12</sup> The condition persisted and was to a certain extent permanent.<sup>13</sup>

On January 25, 1983, Ms. Brown filed with the Maryland Health Claims Arbitration Office<sup>14</sup> a malpractice claim against the hospital, and several of the doctors and nurses in attendance during her surgery, including the anesthesiologist, Dr. Harinath S. Meda.<sup>15</sup> Prior to the arbitration hearing, Ms. Brown dismissed with prejudice her claims against all the defendants except Sinai Hospital, a nurse anesthetist, and Dr. Meda.<sup>16</sup> The Health Claims Arbitration Panel found only Dr. Meda liable, and awarded Ms. Brown \$300,000.<sup>17</sup> Dr. Meda subsequently rejected the panel's award.<sup>18</sup>

Ms. Brown filed a complaint in the Circuit Court for Baltimore City against Dr. Meda as the sole defendant.<sup>19</sup> The complaint alleged that the anesthesiologist, or his agents, servants, or employees, negligently failed to properly position Ms. Brown's arm for the surgical procedure, and failed to monitor adequately its position while she was under anesthesia.<sup>20</sup> At a jury trial, evidence estab-

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9. *Meda*, 318 Md. at 421, 569 A.2d at 203.

10. *Id.*

11. *Id.* She complained to her nurses about this at the time. *Id.*

12. *Id.*

13. *Id.*

14. *Brown v. Meda*, 74 Md. App. 331, 333, 537 A.2d 635, 636 (1988). See MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to -09 (1989 & Supp. 1990), which provide the exclusive remedy for a person against a health care provider, unless the parties waive arbitration by mutual agreement under § 3-2A-06A.

Ms. Brown's husband also joined in the action on a loss of consortium claim. *Meda*, 318 Md. at 420 n.1, 569 A.2d at 202 n.1

15. *Meda*, 318 Md. at 421, 569 A.2d at 203.

16. *Id.*

17. *Id.*

18. *Id.* A party may reject the panel's award for any reason. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(a) (1989).

19. *Meda*, 318 Md. at 421-22, 569 A.2d at 203.

The circuit court automatically reviews any arbitration award if one of the parties rejects it. See MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-05(i) & -06 (1989).

20. *Brown v. Meda*, 74 Md. App. 331, 334, 537 A.2d 635, 637 (1988).

lished that it was the anesthesiologist's duty to administer anesthesia, monitor the patient's vital signs, and properly position the patient to protect vulnerable nerves and blood vessels from compression.<sup>21</sup> Ms. Brown produced two expert witnesses who testified that, in their opinions, Dr. Meda departed from the appropriate standard of care in failing to protect the patient's arm during surgery to prevent nerve damage.<sup>22</sup> They also testified that to a reasonable medical certainty, the patient suffered a compression injury to the ulnar nerve during the operation, and that Dr. Meda's departure from the standard of care caused her injury.<sup>23</sup> Ms. Brown's experts were, however, unable to testify conclusively as to the exact position of her arm during surgery.<sup>24</sup>

The jury found for Ms. Brown, awarding her \$600,000 in damages.<sup>25</sup> The trial judge, however, determined that the testimony of the patient's experts "rested upon inferences and thus constituted the kind of *res ipsa loquitur* evidence" barred in Maryland medical malpractice cases.<sup>26</sup> The court granted the doctor's motion for judgment notwithstanding the verdict.<sup>27</sup> Ms. Brown appealed to the Court of Special Appeals, which reversed the trial court, and directed an entry of judgment for her in accordance with the jury ver-

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21. *Meda*, 318 Md. at 421, 569 A.2d at 203. The plaintiff's expert witnesses agreed that the anesthesiologist's duty extends through the surgical procedure. One expert stated that the duty extended until the patient had fully recovered from anesthesia. *Id.*

22. *Brown*, 74 Md. App. at 337-38, 537 A.2d at 638-39.

23. *Id.*

24. *Id.* A neurologist testified that he reviewed Ms. Brown's hospital and other medical records and ruled out other possible causes of ulnar nerve injury, such as leprosy, lead poisoning, and prolonged jackhammer use. *Id.* at 337, 537 A.2d at 638. In searching for the injury's cause, he testified:

We have a perfect scenario with the operative procedure which occurred in February of 1980.

Her arm was strapped on a . . . cushion board, but nonetheless pressure was abnormally applied to the ulnar area around the elbow and it was left there in a period of time and the patient was overcome with anesthesia, could not move it, take the pressure off or even report to her doctors that this happened.

We know that it happened at that time in addition because [of its] proximity to the onset of her symptoms.

*Id.*

A neurological surgeon gave similar testimony, and although Ms. Brown's medical records did not reveal exactly how her arm had been positioned, both experts concluded that "the only standard of care is that the ulnar nerve be protected and be kept from injury and the fact that it was injured therefore tells me that there was a deviation from the standard of care." *Id.* at 338, 537 A.2d at 639.

25. *Id.* at 334, 537 A.2d at 637.

26. *Id.*

27. *Id.*

dict.<sup>28</sup> The Court of Special Appeals held that *res ipsa loquitur* was properly invoked and that the expert testimony strengthened the doctrine's applicability in this case.<sup>29</sup> On petition by Dr. Meda, the Court of Appeals granted *certiorari*.<sup>30</sup>

2. *Legal Background.*—The doctrine of *res ipsa loquitur*,<sup>31</sup> literally "the thing speaks for itself,"<sup>32</sup> is an evidentiary device that permits a plaintiff to establish a *prima facie* case of negligence based on the strength of inferences drawn from circumstantial evidence.<sup>33</sup> In other words, the doctrine "is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident . . . ."<sup>34</sup> *Res ipsa loquitur* is especially useful in cases in which the plaintiff cannot pinpoint how an injury occurred, or determine the exact instrument that caused it.

The doctrine, viable in Maryland today but accepted with some reservation,<sup>35</sup> has been called "notable for [its] persistence if not

28. *Id.* at 345-46, 537 A.2d at 642-43.

29. *See id.* at 345, 537 A.2d at 642.

30. *Meda*, 318 Md. at 422, 569 A.2d at 203.

31. The doctrine's use can be traced to *Byrne v. Boadle*, 159 Eng. Rep. 299 (1863). The plaintiff was injured by a barrel that fell from the defendant's window. Baron Pollock wrote:

I think it would be wrong to lay down as a rule that in no case can [a] presumption of negligence arise from the fact of an accident. . . . It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. . . . Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are *prima facie* responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them.

*Id.* at 301.

32. BLACK'S LAW DICTIONARY 1173 (5th ed. 1979).

33. *See Potts v. Armour & Co.*, 183 Md. 483, 487, 39 A.2d 552, 555 (1944) ("[A plaintiff] may invoke the doctrine . . . if [the act] is . . . so unusual in occurrence when due care is exercised as to carry inherent probability of negligence on the part of the defendant."); *Benedick v. Potts*, 88 Md. 52, 55, 40 A. 1067, 1068 (1898) ("There are instances in which the circumstances surrounding an occurrence . . . are held, if unexplained to indicate the . . . existence of negligence as the efficient cause of any injury complained of."); *Chesapeake & Potomac Tel. Co. v. Hicks*, 25 Md. App. 503, 526, 337 A.2d 744, 758 (1975) ("The doctrine . . . [allows the jury to] infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it.").

34. *Benedick*, 88 Md. at 55, 40 A. at 1068.

35. In a "memorable dissent" on the subject, quoted by the *Meda* court, 318 Md. at 422-23, 569 A.2d at 204, Chief Judge Bond of the Court of Appeals wrote:

It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule.

It is merely a common argumentative expression of ancient Latin brought

memorable for clarity.”<sup>36</sup> Generally and in Maryland, elements required for creating an inference of negligence are: (1) an injury of a type that usually does not occur in the absence of negligence; (2) caused by an instrumentality within the defendant’s exclusive control; and (3) under circumstances that indicate the casualty did not result from the plaintiff’s act or omission.<sup>37</sup> In Maryland, there was some early confusion as to the doctrine’s procedural effects,<sup>38</sup> but it is now settled that *res ipsa loquitur* permits, but does not compel, the jury to infer negligence.<sup>39</sup>

Despite its general acceptance in negligence cases, Maryland courts traditionally have rejected the doctrine in medical malpractice cases.<sup>40</sup> In 1956, the Court of Appeals stated in a medical malpractice case that “[t]he doctrine of *res ipsa loquitur* does not apply. Negligence cannot be inferred from the occurrence alone.”<sup>41</sup> In 1958 the court announced that “[t]he mere fact that an unsuccessful

into the language of the law by men who were accustomed to its use in Latin writings. . . . It may just as appropriately be used in argument on any subject, legal or otherwise. Nowhere does it mean more than the colloquial English expression that the facts speak for themselves, that facts proved naturally afford ground for an inference of some fact inquired about, and so amount to some proof of it.

Potomac Edison Co. v. Johnson, 160 Md. 33, 40-41, 152 A. 633, 636 (1930) (Bond, C.J., dissenting).

36. *Chesapeake & Potomac Tel.*, 25 Md. App. at 510, 337 A.2d at 749.

37. *Leikach v. Royal Crown Bottling Co., Inc.*, 261 Md. 541, 547-48, 276 A.2d 81, 84 (1971); accord *Giant Food, Inc. v. Washington Coca-Cola Bottling Co., Inc.*, 273 Md. 592, 597, 332 A.2d 1, 4 (1975); *Ramsey v. D.P.A. Assocs.*, 265 Md. 319, 325, 289 A.2d 321, 324 (1972).

38. See Thomsen, *Presumptions and Burden of Proof in Res Ipsa Loquitur Cases in Maryland*, 3 MD. L. REV. 285, 298 (1939). After discussing the leading Maryland cases at the time, the article concluded that the doctrine’s successful application results in a rebuttable presumption of law that the defendant was negligent, and shifts to the defendant the burden of production. See also *Blankenship v. Wagner*, 261 Md. 37, 45, 273 A.2d 412, 416 (1971) (the plaintiff’s successful invocation of *res ipsa loquitur* shifted to the defendants the burden of coming forward with evidence of non-negligence).

39. The court in *Chesapeake & Potomac Tel.* stated:

We believe that the true interpretation of *res ipsa loquitur* in Maryland, despite apparent inconsistencies in discussing it, is that espoused by the great majority of American courts . . . . As for the plaintiff, the doctrine furnishes sufficient evidence to go to the trier of fact. As for the defendant, the burden of proof is not shifted to him, nor is any burden of introducing evidence cast upon him, except in the very limited sense that if he fails to do so, he runs the risk that the trier of fact may, and very likely will, find against him.

25 Md. App. at 529-30, 337 A.2d at 760.

40. See *Hans v. Franklin Square Hosp.*, 29 Md. App. 329, 335, 347 A.2d 905, 909-10 (1975), cert. denied, 276 Md. 744 (1976); *Raitt v. Johns Hopkins Hosp.*, 22 Md. App. 196, 198, 322 A.2d 548, 550 (1974), rev’d, 274 Md. 489, 336 A.2d 90 (1975); *Johns Hopkins Hosp. v. Genda*, 255 Md. 616, 625-26, 258 A.2d 595, 600 (1969).

41. *Bettigole v. Diener*, 210 Md. 537, 541, 124 A.2d 265, 267 (1956) (the patient,

result follows medical treatment is not of itself evidence of negligence. Nor does the doctrine of *res ipsa loquitur* apply."<sup>42</sup> In Maryland, these two statements are cited as authority for the doctrine's rejection, but the reasoning behind the statements has never been fully explained.<sup>43</sup>

Instead of using *res ipsa loquitur* in malpractice cases, the plaintiff must produce expert testimony from which the trier-of-fact can identify two elements: the standard of skill and care a professional ordinarily exercises, and the defendant's failure to satisfy this standard.<sup>44</sup> Expert testimony may be dispensed with only in negligence cases so obvious that the jury's common knowledge and experience is sufficient to draw the inference of negligence.<sup>45</sup> Thus, for example, no expert evidence was required to establish the negligence of an emergency room doctor who failed to examine, diagnose, and treat a patient who had been struck by a car and who later died from the injuries.<sup>46</sup> Similarly, a surgeon who used non-sterile needles in performing a surgical procedure was found negligent without expert testimony.<sup>47</sup> Maryland courts, however, did not expressly apply *res ipsa loquitur* in these cases.

The Court of Special Appeals hinted in several recent cases that it would, under the proper set of facts, apply *res ipsa loquitur* to a medical malpractice case. In 1976, the court in *Hans v. Franklin Square Hospital*,<sup>48</sup> bemoaned the fact that *stare decisis* prevented it from applying the doctrine to a case in which the plaintiff underwent

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who suffered facial paralysis following mastoidectomy, failed to produce legally sufficient evidence of the defendant's negligence).

42. *Lane v. Calvert*, 215 Md. 457, 462-63, 138 A.2d 902, 905 (1958) (the evidence sustained a finding that a physician was not negligent in treating a patient with lipoidal dye technique to locate pus following an operation).

43. The statements arose from several early cases in which the plaintiff sought to prove the defendant's negligence from the occurrence of the injury itself. See *Dashiell v. Griffith*, 84 Md. 363, 35 A. 1094 (1896); *State ex rel. Janney v. Housekeeper*, 70 Md. 162, 26 A. 382 (1889). The basis for the statements appears to be the presumption under Maryland law that physicians and other professionals have exercised their legal duty of ordinary care and skill. *Dashiell*, 84 Md. at 380, 35 A. at 1096; *Janney*, 70 Md. at 171, 26 A. at 384. To that extent, the plaintiff bore the burden of showing negligence, which "cannot be presumed, but must be affirmatively proved." *Janney*, 70 Md. at 171, 26 A. at 384. The synonymous use of "presumption" and "inference" in early cases may have resulted from the notion that negligence cannot be inferred nor presumed from the occurrence alone. See *Thomsen*, *supra* note 38, at 288-89.

44. *Johns Hopkins Hosp. v. Genda*, 255 Md. 616, 620, 258 A.2d 595, 598 (1969).

45. *Thomas v. Corso*, 265 Md. 84, 97-99, 288 A.2d 379, 387-88 (1972).

46. See *id.* at 99, 288 A.2d at 388.

47. See *Suburban Hosp. Ass'n, Inc. v. Hadary*, 22 Md. App. 186, 195, 322 A.2d 258, 263 (1974).

48. 29 Md. App. 329, 347 A.2d 905 (1975), *cert. denied*, 276 Md. 744 (1976).

a hemorrhoidectomy and emerged from surgery with a "claw hand."<sup>49</sup> The court in *Hans* upheld the judgment notwithstanding the verdict entered for the defendant physician on the ground that because the doctrine of *res ipsa loquitur* was barred in Maryland with respect to medical malpractice suits, the jury could not infer negligence from an expert witness' testimony.<sup>50</sup>

In 1981, the Court of Special Appeals for the first time used *res ipsa loquitur* to analyze a medical malpractice case. In that case, *Stevens v. Union Memorial Hospital*,<sup>51</sup> the court denied the plaintiff recovery for failing to establish that the defendants had exclusive control of the instrumentality causing injury.<sup>52</sup> Although it did not find *res ipsa loquitur* applicable, the court questioned Maryland's rejection of the doctrine in medical malpractice cases.<sup>53</sup> Thus, when *Brown v. Meda*<sup>54</sup> appeared on the appeals docket, the stage was set for *res ipsa loquitur*'s application to a medical malpractice case.

3. *Analysis.*—In reversing the trial court's judgment notwithstanding the verdict, the Court of Special Appeals found that *res ipsa loquitur* applied, and that its appropriate use was strengthened by the testimony of Ms. Brown's expert witnesses.<sup>55</sup> The Court of

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49. See *id.* at 335-36, 347 A.2d at 909-10. After the operation, the plaintiff awoke to find his arm and hand paralyzed. During a postoperative examination, the doctor who performed the operation noted in his record that the plaintiff suffered from ulnar nerve palsy, "probably due to table position with arm up over head." The patient attempted to show what probably caused his paralysis by calling as expert witnesses two doctors. *Id.* at 336, 347 A.2d at 910. Although each doctor's opinion was that there was less than adequate care in conforming with community standards, neither witness was able to single out a negligent act that contributed to the injury. *Id.* at 336-37, 347 A.2d at 910.

50. See *id.* at 338, 347 A.2d at 911.

51. 47 Md. App. 627, 424 A.2d 1118 (1981).

52. See *id.* at 631-32, 424 A.2d at 1120-21.

53. The court stated, "[w]e are not to be understood as refusing to sanction the application of the doctrine of *res ipsa loquitur* to medical malpractice cases. The question of whether the prior holdings of the Court of Appeals and this Court are still viable will have to await another day." *Id.* at 632 n.5, 424 A.2d at 1121 n.5.

54. 74 Md. App. 331, 537 A.2d 635 (1988), *aff'd*, 318 Md. 418, 569 A.2d 202 (1990).

55. See *id.* at 344-45, 537 A.2d at 642. The court based its holding on persuasive authority from other jurisdictions: *Holloway v. Southern Baptist Hosp.*, 367 So. 2d 871, 873-74 (La. App. 1978) (expert testimony that during an operation, stretching was far more probable than compression as the cause of a disabling arm injury, helped support the use of *res ipsa loquitur*), *cert. denied*, 368 So. 2d 458 (La. 1979); *Parks v. Perry*, 68 N.C. App. 202, 206, 314 S.E.2d 287, 290 (1984) (expert testimony that an arm injury would not have occurred if the arm was properly positioned during an operation was sufficient to support application of *res ipsa loquitur*), *review denied*, 311 N.C. 761, 321 S.E.2d 142 (1984); *Matlick v. Long Island Jewish Hosp.*, 25 A.D.2d 538, 538-39, 267 N.Y.S.2d 631, 632-33 (1966) (medical expert's personal knowledge of events that led to a nerve injury during an operation entitled the plaintiff to rely on *res ipsa loquitur*); *Jones v. Harrisburg Polyclinic Hosp.*, 496 Pa. 465, 474-75, 437 A.2d 1134, 1138-39



Special Appeals interpreted the line of Maryland cases that do not require expert testimony in certain "obvious injury" malpractice cases as tacit application of *res ipsa loquitur*.<sup>56</sup> The court found that the patient's expert witnesses drew "rational conclusions [based on] much more than mere conjecture."<sup>57</sup> Their testimony supported both the jury's inference that the defendant was negligent, and the verdict for the plaintiff based on that inference.<sup>58</sup> To the extent that it was inconsistent with *Brown*, the Court of Special Appeals expressly overruled *Hans v. Franklin Square Hospital*.<sup>59</sup>

The Court of Appeals affirmed, not on the basis of *res ipsa loquitur*, but on the ground that the testimony was sufficient to support an inference of negligence drawn by the plaintiff's experts.<sup>60</sup> The Court of Appeals thus distinguished between the inference of negligence drawn by an expert, and the inference of negligence that a jury is permitted to draw.<sup>61</sup> Only in the latter case, the court said, is the doctrine of *res ipsa loquitur* invoked:

The closest that this case comes to a reliance upon *res ipsa loquitur* is in the inferential reasoning process used by the plaintiff's experts in arriving at their conclusions that Dr. Meda was negligent . . . . [N]either [expert] could testify as to the precise act of negligence that caused [the] injury . . . . Each doctor, based upon his knowledge of the facts and upon his expertise, concluded that Mrs. Brown's injury was one that ordinarily would not have occurred in the absence of negligence on the part of the anesthesiologist. This inferential reasoning has a familiar ring to it. It

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(1981) (expert testimony that, absent negligence, suprascapular nerve palsy does not ordinarily occur during gynecological procedures, supported an application of *res ipsa loquitur*); *Van Zee v. Sioux Valley Hosp.*, 315 N.W.2d 489, 493-94 (S.D. 1982) (expert testimony that a shoulder injury was caused, to a reasonable certainty, by an injection given during an operation was sufficient to show a deviation from the community standard of care).

56. The court stated:

An examination of several other cases, however, reveals that the Court did not mean precisely what it seemed to say, i.e., that *res ipsa loquitur* can never apply to medical malpractice cases. The Court frequently has said that when the common knowledge of laymen is extensive enough to recognize or infer negligence from the facts, the jury may do so without the aid of expert testimony, thus applying *res ipsa loquitur*.

*Brown*, 74 Md. App. at 342, 537 A.2d at 641. Thus, in the Court of Special Appeals' opinion, *stare decisis* did not constrain its decision.

57. *Id.* at 344, 537 A.2d at 641.

58. *Id.*

59. *Id.* at 346, 537 A.2d at 636-37.

60. See *Meda*, 318 Md. at 420, 569 A.2d at 203.

61. See *id.*

is a major part of the concept of *res ipsa loquitur*. It is not, however, *res ipsa loquitur*.<sup>62</sup>

Instead of applying *res ipsa loquitur*, the Court of Appeals in *Meda* found that although the expert witnesses relied on circumstantial as well as direct evidence,<sup>63</sup> their reasoning was based on logic rather than on speculation or conjecture.<sup>64</sup> The circumstantial evidence therefore sufficiently supported the experts' inferences of negligence. The Court of Appeals said that because the expert testimony established a *prima facie* case of the defendant's negligence, the jury verdict should have been permitted to stand.<sup>65</sup>

The court's distinction in *Meda* between an inference of negligence properly drawn by an expert, and one based on the common knowledge of a jury clarifies two areas of confusion in Maryland medical malpractice law. First, because expert testimony is still required to establish negligence and causation in the ordinary medical malpractice case,<sup>66</sup> the court's definition of *res ipsa loquitur* as a jury's inference of negligence unaided by expert testimony precludes the doctrine's application in ordinary medical malpractice cases. Second, the court expressly disapproved the holding in *Hans*,<sup>67</sup> clarifying that it will permit experts with sufficient knowledge and training to make inferences of negligence similar to that found in a *res ipsa loquitur* case. That is, a properly qualified medical expert may draw an inference of negligence from the facts surrounding an injury, even though those facts do not show the mechanism of the injury or the precise manner in which the defendant was negligent.<sup>68</sup>

*Meda*'s practical effect is that, although expert testimony is still required for a medical malpractice case, an expert witness may now draw the same inferences that a jury, aided by expert testimony, would draw in jurisdictions where the doctrine is permitted.<sup>69</sup>

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62. *Id.* at 424-25, 569 A.2d at 204.

63. *See id.* at 427, 569 A.2d at 205.

64. *See id.* at 428, 569 A.2d at 206.

65. *See id.* at 429, 569 A.2d at 207.

66. The court confirmed that if the plaintiff had not produced expert witnesses, the jury would not have been permitted to infer negligence from the injury's mere occurrence, as this case was not one of "obvious injury." *Id.* at 428, 569 A.2d at 206-07.

67. *See id.* at 427, 569 A.2d at 206.

68. *Id.*

69. *See, e.g.,* *McWain v. Tucson Gen. Hosp.*, 137 Ariz. 356, 360, 670 P.2d 1180, 1184 (1983) (medical evidence is required to show that injury does not ordinarily occur in the absence of a doctor's negligence); *Spidle v. Steward*, 79 Ill. 2d 1, 6, 37 Ill. Dec. 326, 331, 402 N.E.2d 216, 218 (1980) (reaffirming the court's recognition that expert testimony can establish a probability of negligence if jurors were unfamiliar with the issue); *Buck-*

Thus, if the plaintiff's expert witness can establish the elements of *res ipsa loquitur* (without identifying them as such) and draw an inference that the defendant was negligent, this will be held sufficient evidence of negligence to go to the jury.<sup>70</sup> The expert witness need not identify the exact cause of the patient's injury, but need only present credible evidence that the doctor's failure to meet the standard of care resulted in the patient's injuries.<sup>71</sup>

Legal scholars often have argued that there is nothing distinctive about the doctrine of *res ipsa loquitur*, that its invocation represents no more than application of well-recognized principles of inference and circumstantial evidence.<sup>72</sup> In a formal sense, the logic involved is certainly the same. Practically, *res ipsa loquitur*'s persistence can be attributed to a general trend toward strict liability and social insurance.<sup>73</sup> This general trend is reflected, for example, in courts' increasing tendency to impose liability without regard to fault, on manufacturers of defective products, and the increasing adoption of no-fault automobile insurance statutes.<sup>74</sup> It has often been said, however, that a physician is not an insurer or warrantor of cures.<sup>75</sup> This may explain Maryland's reluctance to extend the doctrine to medical malpractice cases.

On the other hand, legal scholars also believe that "nowhere is the doctrine needed more than in the malpractice action."<sup>76</sup> Often, the patient is anesthetized at the time of the injury, or is otherwise unable to determine what is being done to her body. The patient's lack of medical expertise leads her to rely on the physician's profes-

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elew v. Grossbard, 87 N.J. 512, 527, 435 A.2d 1150, 1158 (1981) (expert testimony that the medical community recognizes that an event does not ordinarily occur absent negligence can sufficiently support application of *res ipsa loquitur*); Jones v. Harrisburg Polyclinic Hosp., 496 Pa. 465, 472-73, 437 A.2d 1134, 1138 (1981) (an inference of negligence is permitted when expert testimony can establish that an event would not ordinarily occur absent negligence).

70. *Meda*, 318 Md. at 428, 569 A.2d at 207.

71. *Id.* at 427, 569 A.2d at 206.

72. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 39, at 243 (5th ed. 1984); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 258 (1936); Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 184-85, 232, 234 (1949).

73. 4 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 19.5, at 29-30 (2d ed. 1986).

74. *Id.*

75. See, e.g., Mitchell v. Saunders, 219 N.C. 178, 182, 13 S.E.2d 242, 245 (1941).

76. Hans v. Franklin Square Hosp., 29 Md. App. 329, 330, 347 A.2d 905, 907 (1975). "Because the practice of medicine is itself the application of an inexact science, the proving of medical malpractice, causing untoward results, is by necessity also inexact. The doctrine of *res ipsa loquitur* facilitates such proof." *Id.*

sional judgment and skill.<sup>77</sup> In addition, physicians are reluctant to testify against other physicians. This is so well recognized that it has been termed the "conspiracy of silence."<sup>78</sup> These recognized obstacles to plaintiffs in medical malpractice cases have led many jurisdictions to permit the doctrine's application.<sup>79</sup>

American jurisdictions do not agree about when *res ipsa loquitur* may be applied in a medical malpractice action.<sup>80</sup> But a growing number of jurisdictions apply the doctrine not only when jurors can determine from their own common knowledge that the defendant was negligent, but also when they can infer this from the testimony of expert witnesses.<sup>81</sup> The *Second Restatement of Torts* is in accord with these jurisdictions, commenting that "expert testimony . . . may be essential to the plaintiff's case where, as for example in some actions for medical malpractice, there is no fund of common knowledge which may permit laymen reasonably to draw the conclusion."<sup>82</sup> Other jurisdictions limit *res ipsa loquitur*'s application to situations in which the jury can infer negligence solely from its own knowledge.<sup>83</sup> In *Meda*, Maryland now seems to have aligned itself with the latter jurisdictions. But the Court of Appeals did not reiterate the maxim that "*res ipsa loquitur* does not apply" in medical malpractice cases. This could indicate that the doctrine may now be invoked in the so-called "obvious injury" case. From a practical standpoint, however, applying the doctrine to an "obvious injury" is superflu-

77. At least two legal scholars have agreed that the patient's trust and dependence also places on the doctor the duty to give a full explanation of any untoward treatment result. *Res ipsa loquitur* therefore may be regarded as a natural legal corollary of the physician's moral and professional duty. Louisell & Williams, *Res Ipsa Loquitur—Its Future in Medical Malpractice Cases*, 48 CALIF. L. REV. 252, 252-53 (1960).

78. 1 D. LOISELL & H. WILLIAMS, MEDICAL MALPRACTICE § 14.01, at 14-4 to -5 (1990).

79. *Id.* at 14-2 to -4.

80. *Id.* § 14.04, at 14-64 to -65.

81. *E.g.* *Silverson v. Weber*, 57 Cal. 2d 834, 372 P.2d 97, 22 Cal. Rptr. 337 (1962) (if risks in surgical operation are inherent and an injury that is rare occurs, *res ipsa loquitur* may not be invoked unless it can be shown that such an injury does not occur without negligence); *Walker v. Distler*, 78 Idaho 38, 47, 296 P.2d 452, 457-58 (1956) (expert testimony is necessary "because the causative factors [of the injury] are not ordinarily within the knowledge . . . of the jury"); *Utica Mutual Ins. Co. v. Ripon Cooperative*, 50 Wis. 2d 431, 436-37, 184 N.W.2d 65, 67 (1971) ("plaintiff may [use] *res ipsa loquitur* if he can produce . . . expert testimony which serves in the place of the jurors' common knowledge").

82. RESTATEMENT (SECOND) OF TORTS § 328D comment d (1965).

83. *E.g.* *Hornbeck v. Homeopath Hosp. Ass'n*, 57 Del. 120, 126, 197 A.2d 461, 463-64 (1964); *Lathon v. Hadley Memorial Hosp.*, 250 A.2d 548, 549 (D.C. 1969); *Collins v. Meeker*, 198 Kansas 390, 400, 424 P.2d 488, 497 (1967); *Semerjian v. Stetson*, 284 Mass. 510, 515, 187 N.E. 829, 831 (1933).

ous, because Maryland law has always permitted a jury to infer negligence when the breach of duty is obviously below the accepted standard of care.<sup>84</sup>

The Court of Appeals' refusal to extend *res ipsa loquitur* to the ordinary medical malpractice case is not surprising, given current trends in Maryland medical malpractice law. As in other jurisdictions, the balance between the plaintiff and the defendant in the traditional tort system has in recent years been undermined by a number of factors, perhaps most significantly by jury emotions in determining liability and damages.<sup>85</sup> Maryland courts have added to this imbalance by promulgating liberal discovery rules and substantive law decisions favoring plaintiffs.<sup>86</sup> For example, Maryland's informed consent doctrine has increased physicians' burden to reveal to their patients vital treatment information.<sup>87</sup> And the "strict locality" rule has been abandoned in favor of permitting expert witnesses to give evidence on a nationwide standard of care.<sup>88</sup> By permitting plaintiffs to import expert witnesses from other parts of the country, the judicial system has reduced the need for *res ipsa loquitur* in medical malpractice cases, and weakened the "conspiracy of silence" justification for adopting the doctrine.

Skyrocketing health care and medical malpractice insurance costs in recent years have led the Maryland legislature and courts to take steps to even the balance between the parties in a medical malpractice action. The Maryland Health Claims Arbitration Act<sup>89</sup> and the \$350,000 cap on noneconomic damages in malpractice actions<sup>90</sup> are two such attempts. The court's refusal to extend *res ipsa loquitur*, with or without expert testimony, to the ordinary malpractice case is consistent with these remedial aims of tort reform. Had the court relaxed its proscription against *res ipsa loquitur* in *Meda*, medical malpractice actions would likely have increased, with patients invoking the doctrine when there is a grave injury but no clear negligence, or when the injury is merely the unfortunate result of a new medical treatment.

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84. See, e.g., *Thomas v. Corso*, 265 Md. 84, 288 A.2d 379 (1972); *Suburban Hosp. Ass'n, Inc. v. Hadary*, 22 Md. App. 186, 322 A.2d 258 (1974).

85. Quinn, *The Health Care Malpractice Claims Statute: Maryland's Response to the Medical Malpractice Crisis*, 10 U. BALT. L. REV. 74, 79 (1980).

86. *Id.*

87. See *Sard v. Hardy*, 281 Md. 432, 450, 379 A.2d 1014, 1025 (1977).

88. See *Shilkret v. Annapolis Emergency Hosp. Ass'n*, 276 Md. 187, 195, 349 A.2d 245, 249 (1975).

89. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to -09 (1989).

90. *Id.* § 11-108.

The court in *Meda* established a middle ground between an expert opinion of negligence based on clearly ascertainable facts, and expert opinion based on "mere speculation or conjecture."<sup>91</sup> When medical records and the testimony of hospital personnel treating the patient reveal specific negligent acts, a qualified physician may make inferences predicated on those facts.<sup>92</sup> When the expert's conclusions are unsupported by factual evidence or analysis, these bare conclusions cannot support an expert's inference of negligence.<sup>93</sup> The middle ground carved out in *Meda* permits an expert witness to infer from facts known to the patient, and from her own knowledge, how the injury probably occurred, and to draw from those probabilities an inference of negligence. To this extent, the court's decision should make it easier for a plaintiff to present evidence on causation in a medical malpractice case.

4. *Conclusion.*—In *Meda*, the Court of Appeals distinguished between permitting a jury aided by expert testimony to infer negligence, and permitting an expert witness to infer negligence from circumstantial evidence. Instead of extending the *res ipsa loquitur* doctrine to medical malpractice cases, the court continues to require expert testimony for all but the most obvious and egregious cases of substandard medical procedure, but permits the expert to draw inferences of negligence similar to those found in a *res ipsa loquitur* case. The distinction drawn in *Meda* is at best "a matter of semantics."<sup>94</sup> But the distinction nevertheless clarifies *res ipsa loquitur*'s applicability to a medical malpractice action, and the sufficiency of expert testimony required for a finding of negligence. As a result of this decision, Maryland has gained the benefits of *res ipsa loquitur* enjoyed by jurisdictions that permit a jury to infer negligence aided by expert testimony, while avoiding the possibility of increased

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91. *Meda*, 318 Md. at 427, 569 A.2d at 206.

92. *Bethlehem Steel Co. v. Munday*, 212 Md. 214, 218, 129 A.2d 162, 164 (1957) (upholding a trial court's ruling to exclude a doctor's testimony when it was not clear on what facts he based his opinion).

93. This may have been the case in *Hans v. Franklin Square Hospital*, where the expert witness appeared to base his conclusion of negligence on the fact that the patient "went in to have a hemorrhoidectomy and . . . came out with a claw hand." 29 Md. App. 329, 338, 347 A.2d 905, 911 (1976). Conclusions without a factual basis are sometimes referred to in other jurisdictions as "net opinions." See, e.g., *Jones v. Harrisburg Polyclinic Hosp.*, 496 Pa. 465, 437 A.2d 1134 (1981).

94. *Orkin v. Holy Cross Hosp.*, 318 Md. 429, 569 A.2d 207 (1990) (companion decision).

medical malpractice claims that might have resulted from the doctrine's expanded availability in medical malpractice actions.

MARYANN S. COHEA

## VII. FAMILY LAW

### A. *The Use of Accounts Created Pursuant to the Maryland Uniform Gifts to Minors Act*

In *Brodsky v. Brodsky*,<sup>1</sup> the Court of Appeals held that under the Maryland Uniform Gifts to Minors Act (MUGMA),<sup>2</sup> a donor's intent to create a custodianship lasting until the minor reaches age twenty-one must be specified in writing.<sup>3</sup> The court also ruled that a parent cannot use MUGMA account funds to satisfy his independent obligation to support the child,<sup>4</sup> and that a court cannot modify a divorce decree's child support provisions after the child reaches the age of majority.<sup>5</sup>

The *Brodsky* court analyzed three separate but related issues. In this case of first impression, the court interpreted MUGMA to impose a written requirement to extend the duration of a MUGMA custodianship.<sup>6</sup> The court then held that funds accumulated in a MUGMA account are indefeasibly and irrevocably vested in the child, and a father cannot use the funds to satisfy an obligation to provide a college education for his daughter.<sup>7</sup> Finally, the court followed the case law in a majority of other jurisdictions in holding that a court does not have jurisdiction to modify a child support agreement after the child has attained the age of majority.<sup>8</sup>

1. *The Case.*—Irvin and Marcia Brodsky married in 1967 and their daughter, Adrienne, was born three years later.<sup>9</sup> In 1977, Irvin and Marcia signed a voluntary separation agreement, and on January 17, 1979 were divorced by the Circuit Court for Baltimore County. The divorce decree incorporated the separation agreement's terms, which provided in part that Irvin would pay for all of

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1. 319 Md. 92, 570 A.2d 1235 (1990).

2. MD. EST. & TRUSTS CODE ANN. §§ 13-301 to -310 (1974) (repealed 1989). Forty-eight states have passed a version of the Uniform Gifts to Minors Act (UGMA). Some states, such as Maryland, have added the first letter of their state name to the acronym and have made slight changes in the provisions, but in general the statutes are uniform. See also *infra* note 19.

3. See 319 Md. at 99, 570 A.2d at 1238.

4. See *id.* at 100, 570 A.2d at 1238.

5. See *id.*, 570 A.2d at 1239.

6. See *id.* at 98-99, 570 A.2d at 1237-38.

7. See *id.* at 99-100, 570 A.2d at 1238-39.

8. See *id.* at 100, 570 A.2d at 1238-39.

9. *Id.* at 94, 570 A.2d at 1235.



Adrienne's college expenses.<sup>10</sup>

In December of 1974, Irvin opened a savings account for Adrienne pursuant to the Maryland Uniform Gifts to Minors Act, and opened other accounts in 1978, 1983, 1987, and 1988. Irvin was both donor and custodian of each account.<sup>11</sup> Adrienne enrolled as an undergraduate student at Boston University in the spring of 1988.<sup>12</sup> After she turned eighteen, Adrienne wrote to her father requesting that he deliver all accounts maintained on her behalf, but Irvin did not comply.<sup>13</sup> Marcia wrote to Irvin two months later requesting that he pay Adrienne's first semester college expenses.

After receiving no reply, Marcia in August 1988 filed for a contempt order to force Irvin to pay Adrienne's college expenses. Adrienne filed a complaint against Irvin for an accounting and return of monies maintained in the MUGMA accounts. In May 1989, Irvin filed a complaint to modify the divorce decree to require Marcia and Adrienne to contribute to Adrienne's college expenses. Irvin also sought to limit his obligation to paying for Adrienne to attend a more reasonably priced college.<sup>14</sup>

The Circuit Court for Baltimore County tried all issues in May 1989, and ordered Irvin to pay Adrienne's college expenses—an obligation that he assumed in the divorce decree.<sup>15</sup> Although the court dismissed Irvin's complaint to modify the divorce decree, it allowed him to use the MUGMA accounts to pay Adrienne's college expenses. The court granted Adrienne's request for an accounting, but denied her petition for delivery of the MUGMA accounts, and ordered that Irvin remain their custodian until Adrienne reached age twenty-one.<sup>16</sup>

Adrienne and Irvin each appealed to the Court of Special Ap-

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10. *Id.*, 570 A.2d at 1235-36. Paragraph 5 of the voluntary separation agreement provided in part:

If the child of the parties makes application to and is accepted by any college before reaching her 21st birthday, the husband agrees to provide the child with an undergraduate college education to include tuition, fees, room and board, and other costs associated therewith. However, if at any time after enrolling, the child ceases to be a regular full-time student in good standing, the husband's obligations under this section shall terminate.

*Id.*

11. *Id.* at 94-95, 570 A.2d at 1236.

12. *Id.* at 95, 570 A.2d at 1236.

13. *Id.* In May 1989, the MUGMA accounts had a fair market value of \$27,891. *Id.*

14. *Id.*

15. *Id.*; see *supra* note 10 and accompanying text.

16. *Id.* at 95-96, 570 A.2d at 1236.

peals.<sup>17</sup> Adrienne claimed that the trial court erred in not granting her petition for delivery of the MUGMA accounts, and Irvin claimed that the trial court erred in denying his complaint to modify the divorce decree. The Court of Appeals granted certiorari on both issues prior to a lower court decision.<sup>18</sup>

## 2. *Legal Background and Summary of Reasoning.*—

*a. Statutory Construction of MUGMA.*—The Maryland Uniform Gifts to Minors Act<sup>19</sup> was enacted in 1974 and created a relatively simple and inexpensive way to make gifts to minors while allowing a custodian to retain control of the property until the child reached the age of majority.<sup>20</sup>

In Maryland, the age of majority was lowered on July 1, 1973 from twenty-one to eighteen.<sup>21</sup> But MUGMA's section 13-302(b-1) specifies that "[a] donor who makes a gift to a minor in a manner prescribed in subsection (a) of this section *may provide* that the custodian shall deliver, convey, or pay it over to the minor on his attaining the age of 21 years."<sup>22</sup> This amendment allowed a custodian to extend a MUGMA custodianship's duration until the child reached twenty-one, but if the custodian did not specify the extension, the custodianship would automatically terminate on the child's eight-

17. *Id.* at 96, 570 A.2d at 1236.

18. *See id.*

19. MD. EST. & TRUSTS CODE ANN. §§ 13-301 to -310 (1974) (repealed 1989). MUGMA was repealed as of July 1, 1989, Act of May 25, 1989, ch. 638, 1989 Md. Laws 1989, but was replaced with a substantially similar act, the Maryland Uniform Transfers to Minors Act (MUTMA). MD. EST. & TRUSTS CODE ANN. §§ 13-301 to -324 (Supp. 1989). The Court of Appeals held that MUTMA does not apply to the case at bar because § 13-322 provides that it is not applicable to custodial property held in a custodianship that terminated because the minor attained the age of 18 before July 1, 1989. *See Brodsky*, 319 Md. at 97, 570 A.2d at 1237. Adrienne turned 18 before MUTMA's effective date. *Id.*

20. *See Brodsky*, 319 Md. at 96, 570 A.2d at 1236. Section 13-302(a) provides in part:

An adult may, during his lifetime or by will, make a gift of . . . money . . . to a person who is a minor on the date of the gift or distribution:

....  
(3) If the subject of the gift is money, by paying or delivering it to a broker or a financial institution, for credit to an account in the name of the donor, another adult, a guardian of the minor, or a trust company, followed, in substance, by the words: "as a custodian for [name of minor] under the Maryland Uniform Gifts to Minors Act."

MD. EST. & TRUSTS CODE ANN. § 13-302(a) (1974) (repealed 1989).

21. *See* MD. ANN. CODE art. 1, § 24 (1973).

22. MD. EST. & TRUSTS CODE ANN. § 13-302(b-1) (1975) (repealed 1989) (emphasis added).

eenth birthday.<sup>23</sup> The main issue before the court was whether the donor's intent to extend the custodianship could be expressed orally or must be written.<sup>24</sup>

The court noted that in construing a statute the words are assumed to have their natural and ordinary meaning.<sup>25</sup> By definition, the words "may provide" are an elective clause or condition that may be specified in a contract, statute, deed, or will.<sup>26</sup> If the words are interpreted by their plain meaning, "may provide" requires the donor to manifest her intentions in writing.<sup>27</sup>

Furthermore, the court interpreted legislative intent as requiring a formalized designation when the parties departed from the MUGMA's provisions so that anyone inspecting the account could decipher the donor's intentions.<sup>28</sup> This formalized designation of intent is based on the necessity of documenting donative intent—an element of every inter vivos gift.<sup>29</sup> If the donor's intent was not clearly documented, there might be confusion and doubt among family members, the financial institution, and the court.<sup>30</sup> Hence, formalized writing gives clear and unmistakable evidence of the gift-giver's donative intent.

Irvin Brodsky did not document his intent to extend the custodianship.<sup>31</sup> The Court of Appeals therefore held that he had not made the election under section 13-302(b-1), and thus had a duty to deliver all MUGMA accounts to Adrienne on her eighteenth birthday.<sup>32</sup>

*b. Use of MUGMA Accounts for Independent Obligations.*—The court next considered whether Irvin could use the MUGMA accounts to satisfy his obligation to pay for Adrienne's college educa-

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23. See *Brodsky*, 319 Md. at 97-98, 570 A.2d at 1237.

24. See *id.* at 97, 570 A.2d at 1237.

25. See *id.* at 98, 570 A.2d at 1237.

26. See *id.* The word "may" is generally understood as permissive rather than mandatory, and suggests that a custodian may elect when to terminate the custodianship. See *id.* "Provide" is defined as "to make a proviso or stipulation." See *id.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1827 (1981)). "Proviso" is then defined as "an article or clause (as in a statute, contract or grant) that introduces a condition, qualification, or limitation." *Id.* (quoting WEBSTER'S, *supra*, at 1827). "Stipulation" is defined as "a condition, requirement, or item specified in a contract, treaty, deed, will or law." *Id.* (quoting WEBSTER'S, *supra*, at 2245).

27. See *id.*

28. See *id.* at 98-99, 570 A.2d at 1238.

29. *Id.* at 99, 570 A.2d at 1238.

30. *Id.*

31. *Id.*

32. See *id.*

tion.<sup>33</sup> Because the MUGMA accounts were irrevocably and indefeasibly vested in Adrienne, the court concluded that Adrienne wholly owned the property.<sup>34</sup> Even though he was the account custodian, Irvin could not use the money to satisfy his independent obligation to provide Adrienne's education.<sup>35</sup>

*c. Modification of the Support Agreement.*—The court also decided that the judicial system had no jurisdiction to modify a divorce decree's child support provisions after the child attained the age of majority.<sup>36</sup> Maryland's Family Law article provides that a divorce decree may only be modified if it is for the support of a minor child and if the modifications are in the child's best interests.<sup>37</sup>

Because Adrienne was older than eighteen when Irvin filed for modification of the divorce decree to reduce his support obligation,<sup>38</sup> the court held that it had no authority to modify the support provisions. Irvin was bound by the agreement's terms.<sup>39</sup>

### 3. Analysis.—

*a. Statutory Construction.*—This case's resolution turned on the interpretation of two words in section 13-302(b-1): "may provide."<sup>40</sup> As a case of first impression on the statute's interpretation, *Brodsky* required the court to employ the rules of statutory construc-

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33. See *id.* at 99-100, 570 A.2d at 1238. Section 13-303(a) provides:

A gift made in a manner prescribed in this subtitle is irrevocable and conveys to the minor indefeasibly vested legal title to the . . . money . . . but no guardian of the minor has any right, power, duty or authority with respect to the custodial property except as provided in this subtitle.

MD. EST. & TRUSTS CODE ANN. § 13-303(a) (1974) (repealed 1989).

34. See *Brodsky*, 319 Md. at 99-100, 570 A.2d at 1238. Irvin treated the accounts as vested in Adrienne: he provided her mother with annual tax information so that she could file income tax returns for Adrienne. *Id.* at 99, 570 A.2d at 1238.

35. See *id.* at 100, 570 A.2d at 1238.

36. See *id.*, 570 A.2d at 1238-39.

37. See MD. FAM. LAW CODE ANN. § 8-103(a) (1984), which provides that "[t]he court may modify any provision of a deed, agreement, or settlement with respect to the care, custody, education, or support of any minor child of the spouses, if the modification would be in the best interests of the child." *Id.*

38. *Brodsky*, 319 Md. at 100, 570 A.2d at 1238-39. Adrienne had reached the age of majority, as defined by the Maryland Code, when she turned 18. See MD. ANN. CODE art. 1, § 24, (1984); *supra* note 21 and accompanying text.

39. See 319 Md. at 100, 570 A.2d at 1238-39.

40. If the court held that the intention required by section 13-302(b-1) could be expressed orally, then the custodianship would last until Adrienne turned 21. Adrienne would not reach this age until April 21, 1991, after a good portion of the MUGMA account had been expended for her college education. See Appellee's Brief at 10-11, *Brodsky v. Brodsky*, 319 Md. 92, 570 A.2d 1235 (1990) (No. 89-120).

tion.<sup>41</sup> "[T]he cardinal rule of statutory construction is to determine legislative intent."<sup>42</sup> In ascertaining legislative intent, courts examine a statute's plain meaning.<sup>43</sup> The parties in *Brodsky* diverged fundamentally in explaining the legislative intent and plain meaning of section 13-302(b-1).<sup>44</sup>

Irvin Brodsky argued that courts should not correct defects in legislation by inserting or deleting words.<sup>45</sup> The statute does not indicate that the donor's intentions should be or must be in writing.<sup>46</sup> Thus, he argued, it should be construed according to the ordinary and natural meaning of its language, without forcing subtle interpretations to extend its reach.<sup>47</sup>

Although a statute's words are important in determining its appropriate construction, external manifestations such as the bill's function, amendments, and its relationship to earlier and subsequent legislation, favor an interpretation that does not require written expression.<sup>48</sup> Before the 1973 amendment lowered the age of majority to eighteen,<sup>49</sup> the statute did not provide for an optional termination date; all custodianships ended when the minor reached the age of twenty-one.<sup>50</sup> Although the age for delivery of a MUGMA account was lowered, it is likely that the legislators wanted donors to have the easy option of extending the custodianship. In 1989 when the legislature repealed the Maryland Uniform Gifts to Minors Act and enacted the Maryland Uniform Transfers to Minors

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41. See 319 Md. at 97-99, 570 A.2d at 1237-38.

42. See *Kaczorowski v. City of Baltimore*, 309 Md. 505, 511, 525 A.2d 628, 631 (1987) (legislative intent should be ascertained from considering the statute's purpose or objective; other statutes addressing the same subject matter should be read together and harmonized) (citing *Comptroller v. Fairchild Indus.*, 303 Md. 280, 493 A.2d 341 (1985); *Management Personnel Serv. v. Sandefur*, 300 Md. 332, 478 A.2d 310 (1984)).

43. See, e.g., *Kaczorowski*, 309 Md. at 513, 525 A.2d at 632 ("[I]n our efforts to discover purpose, aim, or policy we look at the words of the statute.").

44. Compare Appellee's Brief, *supra* note 40, at 12-14, with Appellant's Brief at 9-12, *Brodsky v. Brodsky*, Court of Special Appeals (Sept. Term 1989) (No. 1067).

45. See Appellee's Brief, *supra* note 40, at 13 (citing *Coleman v. State*, 781 Md. 538, 546, 380 A.2d 49, 54 (1977)).

46. See *id.* at 12.

47. See *id.* at 13 (citing *Coleman*, 781 Md. at 546, 380 A.2d at 54).

48. See *Kaczorowski v. City of Baltimore*, 309 Md. 505, 514-15, 525 A.2d 628, 632-33 (1987) ("When we pursue the context of statutory language, we are not limited to the words of the statute as they are printed in the Annotated Code. We may and often must consider other 'external manifestations' or 'persuasive evidence,' including a bill's title and function paragraphs, amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal . . . ." *Id.*).

49. See *supra* notes 21, 38, and accompanying text.

50. See MD. ANN. CODE art. 92A, § 302 (1972) (repealed 1973).

Act (MUTMA), the legislature again mandated that custodial accounts be held until the minor reached twenty-one.<sup>51</sup> This evidences the legislature's intent to allow custodians greater control over the finances of young adults.

The court, however, followed Adrienne Brodsky's rationale, holding that when the legislature has not defined a term, it should be given its usual and natural meaning.<sup>52</sup> This would make "may provide" an optional clause or condition specified in a contract, statute, deed, or will.<sup>53</sup> The court then leapt from this interpretation to require a donor's active, written election at the time the gift is made.<sup>54</sup>

When the statute is susceptible to more than one interpretation, the court should consider the words' literal and usual meaning, as well as their purpose, intention, and effect in light of the legislation's objectives.<sup>55</sup> The court recognized the consequences of its decision: without documenting the donor's intent to extend the length of a custodianship, each party to the transaction could interpret the situation differently, and confusion could result.<sup>56</sup> Moreover, the donor's intent could easily change over the custodianship's span, and if the intentions were not reduced to writing, courts could not effectively carry out the donor's original plan and fairly distribute the MUGMA account.<sup>57</sup>

The statute's words are ambiguous enough so that either interpretation could be correct, and there is no strong case law leading to the conclusion that one answer is better than the other. By requiring written evidence of the donor's intent to extend the custodianship, the court expansively interpreted the statute, and favored full disclosure of the trust's terms.

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51. MD. EST. & TRUSTS CODE ANN. § 13-301 (Supp. 1989).

52. See *Brodsky*, 319 Md. at 98, 570 A.2d at 1237; see also *Mauzy v. Hornbeck*, 285 Md. 84, 92-93, 400 A.2d 1091, 1096 (1979) (stating "absent any indication from the statute that the language is being used in a special sense, we assume that the statutory words were intended to have their natural, ordinary and generally understood meaning").

53. See *Brodsky*, 319 Md. at 98, 570 A.2d at 1237.

54. See *id.* at 98-99, 570 A.2d 1237-38.

55. See *Tucker v. Fireman's Fund Ins. Co.*, 308 Md. 69, 75, 517 A.2d 730, 732 (1986) (construing the meaning of the word "pedestrian" literally, as an individual traveling on foot, or in light of the enactment's objectives and purposes, which would include a person who is struck by a car while seated on the steps of a building adjacent to a public highway) (citing *State v. Fabritz*, 276 Md. 416, 348 A.2d 275 (1975); *Height v. State*, 225 Md. 251, 170 A.2d 212 (1961)).

56. See *Brodsky*, 319 Md. at 99, 570 A.2d at 1238.

57. See *id.*

b. *Use of MUGMA Accounts for Independent Obligations.*—Section 13-303 provides that once a gift is made pursuant to MUGMA's provisions, it is irrevocable and conveys indefeasibly vested legal title.<sup>58</sup> In *Rudo v. Karp*<sup>59</sup> the Maryland Court of Special Appeals held that MUGMA accounts are irrevocable if there is clear donative intent.<sup>60</sup> Complying with MUGMA's provisions is prima facie evidence that the donor clearly and unmistakably intended to relinquish all interest in the gift.<sup>61</sup> Once the gift is complete, it is irreversible, and the donor retains no legal or equitable rights in the property.<sup>62</sup>

A custodian's duty to hold and preserve the MUGMA property for the child's benefit is similar to a trustee's fiduciary duty.<sup>63</sup> Section 13-304 gives the custodian wide discretion in determining how the property will be expended for the child's benefit.<sup>64</sup>

Although parents may serve as MUGMA custodians, they have an independent duty to support their minor children.<sup>65</sup> The statute

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58. See MD. EST. & TRUSTS CODE ANN. § 13-303 (1974) (repealed 1989); *supra* note 33.

59. 80 Md. App. 424, 564 A.2d 100 (1989).

60. See *id.* at 429-30, 564 A.2d at 104 (the court found a father's clear donative intent in opening savings accounts for his minor sons, so the gifts were irrevocable).

61. See *Gordon v. Gordon*, 70 A.D.2d 86, 91, 419 N.Y.S.2d 684, 688 (1979) ("Although compliance with the procedures set forth by the UGMA is highly probative on the issue of intent, in appropriate circumstances extrinsic evidence may be introduced to rebut the prima facie showing afforded by the prescribed UGMA documentation . . . ." *Id.*).

62. See *Rudo*, 80 Md. App. at 430, 564 A.2d at 103.

63. See, e.g., *Sutliff v. Sutliff*, 515 Pa. 393, 404, 528 A.2d 1318, 1323 (1987) ("[A] custodian's duties may be more properly analogous to those of a trustee with the broadest possible discretionary powers. A trustee owes a fiduciary duty to the beneficiary."); *Newman v. Newman*, 123 Cal. App. 3d 618, 620, 176 Cal. Rptr. 723, 725 (1981) ("The duty of a custodian under the Act is, as that of a trustee, to hold and preserve the custodial property for the benefit of the minor.").

64. See MD. EST. & TRUSTS CODE ANN. § 13-304(b) (1974) (repealed 1989). Section 13-304(b) provides:

The custodian shall pay over to the minor for expenditure by him, or expend for the minor's benefit, so much of or all the custodial property as the custodian deems advisable for the support, maintenance, education, and benefit of the minor in the manner, at the time or times, and to the extent that the custodian in his discretion deems suitable and proper, with or without court order, with or without regard to the duty of himself or any other person to support the minor or his ability to do so . . . .

*Id.*

65. See *In re Marriage Wolfert*, 42 Colo. App. 433, 435-36, 598 P.2d 524, 526 (1979) ("The section [of UGMA] does not relieve a parent of the separate duty to support the children . . . ."); *Sutliff*, 515 Pa. at 398, 528 A.2d at 1320 ("[A] parent's obligation to support minor children is independent of the minor's assets. UGMA funds may not be used to fulfill the parent's support obligation when the parent has sufficient means to discharge it himself."); see also *Newman v. Newman*, 123 Cal. App. 3d 618, 620-21, 176

clearly recognizes that the duty of support is unrelated to the custodian's duty, by providing that the custodian can make distributions for the benefit of the minor "with or without" regard to his own or another person's support obligation.<sup>66</sup>

In *Sutliff v. Sutliff*,<sup>67</sup> the Supreme Court of Pennsylvania held that a father could not withdraw money from an UGMA account to satisfy his portion of a support agreement.<sup>68</sup> The court held that an UGMA account does not relieve a parent of the separate duty to support his children.<sup>69</sup> Furthermore, it does not authorize the custodian to use the funds to fulfill a parent's voluntary agreement; to do so would violate the statutory mandate that the property is to be held for the children's benefit.<sup>70</sup> It also would be analogous to removing the parent's duty of support to the extent that the children have UGMA accounts.<sup>71</sup>

The Supreme Court of Wisconsin held in *Erdmann v. Erdmann*<sup>72</sup> that an UGMA account's use should only be authorized when to do so will benefit the child.<sup>73</sup> Usually, parents must support their children whether or not there are trust funds. Whenever parents are obligated to support their children and are required to use their own funds, it is not in the children's best interests to use UGMA funds for their support.<sup>74</sup> Therefore, the statute cannot be interpreted as authorizing the use of custodial property to satisfy a parent's personal obligation.<sup>75</sup>

Although this was a case of first impression for the Maryland Court of Appeals, *Brodsky v. Brodsky* falls squarely in line with cases from other jurisdictions.<sup>76</sup> The divorce agreement gave Irvin Brod-

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Cal. Rptr. 723, 725 (1981); *Erdmann v. Erdmann*, 67 Wis. 2d 116, 122-24, 226 N.W.2d 439, 442-43 (1975).

66. See *Newman*, 123 Cal. App. 3d at 621, 176 Cal. Rptr. at 725.

67. 515 Pa. 393, 528 A.2d 1318 (1987).

68. See *id.* at 402-04, 528 A.2d at 1322-23.

69. See *id.* at 398, 528 A.2d at 1320.

70. See *id.* at 403-04, 528 A.2d at 1323.

71. See *id.* at 406, 528 A.2d at 1324.

72. 67 Wis. 2d 116, 226 N.W.2d 439 (1975).

73. See *id.* at 122-23, 226 N.W.2d at 442.

74. See *id.* at 124, 226 N.W.2d at 443. If the statute allowed parents to use an UGMA account to support their children, the account would become little more than a tax reduction strategy. Parents could transfer money into the UGMA account to pay taxes at a lower rate, and use the money for the general maintenance of their children. See *Rudo*, 80 Md. App. at 431, 564 A.2d at 103.

75. See *Erdmann*, 67 Wis. at 124-25, 226 N.W.2d at 443.

76. See, e.g., *Newman v. Newman*, 123 Cal. App. 3d 618, 176 Cal. Rptr. 723 (1981). In *Newman*, the California Court of Appeals recognized an obligation to support children based on the role as a parent, apart from any other obligation imposed based on the role



sky two roles: one was that of a parent who voluntarily agreed to support and educate his minor daughter, and the other was that of MUGMA accounts' custodian.<sup>77</sup> The court held that Irvin could not intertwine his obligations: a voluntary agreement providing for a college education is independent of MUGMA custodial duties.<sup>78</sup>

The court, however, need not have gone so far in its decision. In the first issue considered, the court decided that Irvin must deliver the MUGMA accounts to Adrienne because she had already attained the age of majority.<sup>79</sup> If the accounts are already legally and indefeasibly Adrienne's, the issue of whether Irvin could have used the accumulated monies to satisfy an independent obligation is moot.

*c. Modifying the Support Agreement.*—A court may modify a support agreement with respect to the care, custody, education, or support of any minor child so long as it would be in the child's best interests.<sup>80</sup> When a child reaches the age of majority, courts no longer have jurisdiction or authority to order payment of money.<sup>81</sup>

In addition, unexpended MUGMA funds must be given to the child when the child reaches the age of majority.<sup>82</sup> At that time it is the child's decision how to use the funds.<sup>83</sup>

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as an account custodian. *See id.* at 621, 176 Cal. Rptr. at 725. It is unclear, however, what duty is imposed on parents regarding the costs of a college education and, when state law imposes such a duty, whether custodial funds may be used.

In *Brodsky*, the Court of Appeals did not address this question because Irvin's obligation to pay Adrienne's college expenses was derived from a separation agreement incorporated into the divorce decree. 319 Md. at 94-95, 570 A.2d at 1235-26. *See Monticello v. Monticello*, 271 Md. 168, 173, 315 A.2d 520, 522-23 (1974) (if a written agreement exists, its language will govern the parties' rights and responsibilities). This was an independent personal duty that Irvin agreed to, and was not a court mandated order.

77. *See Brodsky*, 319 Md. at 99-100, 570 A.2d at 1237-38; *see also Erdmann*, 67 Wis. 2d at 119, 226 N.W.2d at 441 (One hat was that of a "noncustodial father directed by the court order to make certain payments for the support and education of his minor children . . . . The other was the hat of a custodian of an investment fund established by the divorce judgment for the support, maintenance, education and benefit of the same minor children.").

78. *See* 319 Md. at 99-100, 570 A.2d at 1237-38.

79. *See id.* at 97-99, 570 A.2d at 1237-38.

80. *See* MD. FAM. LAW CODE ANN. § 8-103 (1984).

81. *See Borchert v. Borchert*, 185 Md. 586, 594, 45 A.2d 463, 466-67 (1946).

82. *See* MD. EST. & TRUSTS CODE ANN. § 13-304(d) (1974) (repealed 1989).

83. Delorio, *Estate Law: Uniform Gifts to Minors Act*, 112 MIL. L. REV. 159, 172 (1986) ("UGMA clearly states that when the child reaches the statutory age, the unexpended funds must be given to him or her. . . . The fund will be accessible to the [child] to spend as he wishes when he reaches the statutory age at which the funds must be delivered to him.").

The Court of Special Appeals in *Pumphrey v. Pumphrey*<sup>84</sup> faced a situation similar to *Brodsky*, as the father agreed in a separation agreement to pay for his three sons' support and college expenses until they reached twenty-one, or became self-supporting.<sup>85</sup> One son married while attending college, and the father petitioned for a decree eliminating his support.<sup>86</sup> The court in *Pumphrey* maintained that if the child's best interests do not require the support agreement's modification, the court is powerless to eliminate or reduce the parent's support payment.<sup>87</sup> The court found it unlikely that the son's welfare would be enhanced by removing his support while he is in college.<sup>88</sup>

Using this reasoning, the *Brodsky* court correctly decided that it did not have jurisdiction to modify the divorce agreement.<sup>89</sup> On April 21, 1988, Adrienne reached the age of majority.<sup>90</sup> Irvin, however, did not file for modification of the support agreement until May 9, 1989—more than one year after the court's jurisdiction to modify the support arrangements ended.<sup>91</sup> Thus, the court had no authority to reduce the amount of support Irvin was obligated to provide for Adrienne's college expenses.<sup>92</sup> In addition, it would not be in Adrienne's best interest to remove her source of support while she attends college.

4. *Conclusion.*—*Brodsky v. Brodsky* turned on legislative intent and statutory construction of the Maryland Uniform Gifts to Minors Act. Although section 13-302 does not clearly mandate documentation to extend a custodianship's duration, the Maryland Court of Appeals expanded the statute by requiring that the donor evidence his intent.

The court's decision could have been based solely on this issue; there was no documentation of Irvin's intent to extend the custodianship's duration, so the MUGMA accounts legally and indefeasibly became Adrienne's on her eighteenth birthday. The court, however, chose to address the remaining issues and held that MUGMA's custodial duties are independent of a parent's personal obligations,

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84. 11 Md. App. 287, 273 A.2d 637 (1971).

85. *Id.* at 289, 273 A.2d at 638.

86. *Id.*

87. *See id.* at 292, 273 A.2d at 640.

88. *See id.*

89. *See* 319 Md. at 100, 570 A.2d at 1238-39.

90. *Id.* at 94, 570 A.2d at 1235.

91. *Id.* at 100, 570 A.2d at 1238-39.

92. *See id.*

and held that a court's authority to modify a support provision ends when the child reaches the age of majority.

### B. *Goodwill of Professionals and Marital Property*

In *Prahinski v. Prahinski*<sup>93</sup> the Court of Appeals for the first time addressed whether the goodwill of a professional's practice constitutes marital property subject to apportionment upon dissolution of the professional's marriage.<sup>94</sup> In a split decision,<sup>95</sup> the court held that a solo law practice's goodwill is personal to the individual practitioner, and thus is not marital property subject to division under Maryland's equitable distribution statute.<sup>96</sup>

The majority reasoned that if goodwill is to be considered marital property, it must be an asset with a value separate from the practitioner's reputation,<sup>97</sup> and concluded that a solo law practice's goodwill is inseparable from the attorney's reputation.<sup>98</sup> The majority limited its holding to solo legal practitioners, pointing out that the Rules of Professional Conduct prohibit a lawyer from selling her goodwill, and from forming law partnerships with nonlawyers.<sup>99</sup> According to the majority, these provisions preclude including in the marital estate a solo law practice's professional goodwill.<sup>100</sup>

The majority's reasoning seems convincing at first glance. But as the dissent pointed out, much of the majority's opinion applies equally to other professional practices, as well as to service trades.<sup>101</sup> The spouse of a sole proprietor belonging to a trade or profession may receive an equitable award in the proprietorship's value.<sup>102</sup> The dissent criticized the majority's reliance on the Rules

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93. 321 Md. 227, 582 A.2d 784 (1990).

94. *See id.*

95. *Id.* Judge Cole wrote the majority opinion in a four-to-three decision. *See id.* at 228-42, 582 A.2d at 784-91. Judge Rodowsky wrote the dissenting opinion. *See id.* at 242-45, 582 A.2d at 791-93 (Rodowsky, J., dissenting).

96. *See id.* at 239, 582 A.2d at 790. *See infra* notes 156-169 and accompanying text.

97. *See Prahinski*, 321 Md. at 239, 582 A.2d at 790.

98. *See id.* Although the court did not expressly say that a solo law practice's goodwill could never be a marital asset, it said without qualification that it is personal to the practitioner, and thus not a marital asset. *Id.*

99. *See id.* at 240-41, 582 A.2d at 790-91. The Rules of Professional Conduct prohibit a lawyer from making an agreement that "restricts the rights of a lawyer to practice after termination of the [employment] relationship." THE MARYLAND LAWYER'S RULES OF PROFESSIONAL CONDUCT Rule 5.6(a) (1990) (*reprinted in* 2 MARYLAND RULES appendix (1991)). Rule 5.4 prohibits a lawyer from forming "a partnership with a nonlawyer if any of the activities consist of the practice of law." *Id.*

100. *See Prahinski*, 321 Md. at 240-41, 582 A.2d at 790-91.

101. *See id.* at 244, 582 A.2d at 792 (Rodowsky, J., dissenting).

102. *See id.* at 242, 582 A.2d at 791 (Rodowsky, J., dissenting).

of Professional Conduct to limit its holding to solo legal practitioners. "By mixing the Marital Property Act . . . with the Rules of Professional Conduct . . . without giving effect to the purpose of either ingredient, the court has produced an inequitable result."<sup>103</sup>

Maryland case law prior to *Prahinski* established that the term "marital property" is to be construed broadly to give its remedial purposes effect.<sup>104</sup> *Prahinski* muddies the meaning of "marital property" because it carves out a narrow exception to this broad construction. By focusing its analysis on unique features of legal practice, the majority failed to place *Prahinski* within the existing marital property framework.

1. *The Case.*—Margaret and Leo Prahinski married in 1965.<sup>105</sup> Margaret had just completed her freshman year of college, and chose to discontinue her education in order to maintain the family home.<sup>106</sup> Leo completed his undergraduate education and eventually obtained a law degree.<sup>107</sup> In 1971, Leo started his own law practice. Margaret initially worked with Leo as a legal secretary, but as the practice grew, she became the office manager.<sup>108</sup>

Margaret and Leo separated in 1983 after Leo became involved with another woman. Margaret filed for divorce in November 1986. The Circuit Court for Prince George's County filed a written order, providing for distribution of their marital assets, and granting Margaret a monetary award and alimony.<sup>109</sup> The court included in the monetary award one-half of the law practice's value.<sup>110</sup>

Leo appealed to the Court of Special Appeals, alleging that the

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103. *Id.*

104. See *Niroo v. Niroo*, 313 Md. 226, 545 A.2d 35 (1988) (future renewal commissions on insurance premiums are marital property); *Queen v. Queen*, 308 Md. 574, 521 A.2d 320 (1987) (marital property includes worker's compensation benefits compensating for loss of earning capacity); *Unkle v. Unkle*, 305 Md. 587, 505 A.2d 849 (1986) (an unliquidated personal injury award is not marital property); *Archer v. Archer*, 303 Md. 347, 493 A.2d 1074 (1985) (marital property does not include medical degrees and licenses); *Lookingbill v. Lookingbill*, 301 Md. 283, 483 A.2d 1 (1984) (disability pensions are marital property); *Deering v. Deering*, 292 Md. 115, 437 A.2d 883 (1981) (civilian retirement benefits are marital property).

105. *Prahinski*, 321 Md. at 228, 582 A.2d at 784.

106. *Prahinski v. Prahinski*, 75 Md. App. 113, 121, 540 A.2d 833, 836 (1988). The couple later had two children, and Margaret had primary responsibility for raising them.

*Id.*

107. *Prahinski*, 321 Md. at 228, 582 A.2d at 784.

108. *Prahinski v. Prahinski*, 75 Md. App. at 121, 540 A.2d at 837.

109. *Prahinski*, 321 Md. at 228, 582 A.2d at 784. The trial court found that the law practice was worth \$300,000, consisting entirely of goodwill. See 75 Md. App. at 122, 540 A.2d at 837.

110. See *Prahinski*, 321 Md. at 228, 582 A.2d at 784.

trial court erred by including Leo's law practice in the marital estate.<sup>111</sup> The Court of Special Appeals found that the law practice's value consisted entirely in Leo Prahinski's reputation as attorney-at-law<sup>112</sup> and therefore, it was personal to him and not subject to distribution as part of the monetary award.<sup>113</sup> Nonetheless, the Court of Special Appeals left open the possibility that the professional goodwill, even of a solo law practice, could be marital property if it could be shown to have a value independent of the continued presence or reputation of any particular individual.<sup>114</sup> On certiorari, the Court of Appeals affirmed.<sup>115</sup>

## 2. *Legal Background.*—

*a. Marital Property In General.*—In 1978, Maryland passed the Marital Property Act, its version of an equitable distribution statute, authorizing equity courts to determine upon a marriage's dissolution which property is marital property, and which is nonmarital property.<sup>116</sup> The statute authorized equity courts to determine the value of all marital property,<sup>117</sup> and to grant a monetary award as an adjustment of the equities and rights of the spouses concerning marital property.<sup>118</sup> The courts have construed the Marital Property

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111. 75 Md. App. at 126, 540 A.2d at 839.

112. *See id.* at 135, 540 A.2d at 844. The Court of Appeals agreed with the Court of Special Appeals' finding. *See Prahinski*, 321 Md. at 239-40, 582 A.2d at 790.

113. 75 Md. App. at 135, 540 A.2d at 844. The Court of Special Appeals noted that if goodwill had no value separate from the practitioner, it merely represented future earning capacity. *Id.* Future earning capacity is not a marital asset subject to distribution on divorce. *See Archer v. Archer*, 303 Md. 347, 357, 493 A.2d 1074, 1080 (1985).

114. *See* 75 Md. App. at 136, 540 A.2d at 844. The Court of Special Appeals expressly adopted the case-by-case approach to determine whether an asset is marital property. A small minority of jurisdictions follow this approach. *See id.* at 133-34, 540 A.2d at 843.

115. *See Prahinski*, 321 Md. at 242, 582 A.2d at 791.

116. *See* Act of May 29, 1978, ch. 794, 1978 Md. Laws 2304 (originally codified at MD. CTS. & JUD. PROC. CODE ANN. §§ 3-6A-01 to -08 (1980 & Supp. 1983); recodified at MD. FAM. LAW CODE ANN. §§ 8-201 to -213 (1984)). The Act greatly expanded the equity courts' authority to dispose of property incidental to divorce. *See id.* Before 1978, equity courts had no authority to divide the spouses' property. An equity court could award to the wife the property she had when she married, and could determine who owned certain property, but it could not transfer property from one spouse to another, nor adjust personal property rights if the wife made no monetary contributions toward the property's purchase. *See McClear v. McClear*, 298 Md. 320, 332-33, 469 A.2d 1256, 1262 (1984).

117. *See* MD. FAM. LAW CODE ANN. § 8-204 (1984).

118. *See id.* § 8-205(a):

After the court determines which property is marital property, and the value of the marital property, the court may grant a monetary award as an adjustment of the equities and rights of the parties concerning marital property, whether or not alimony is awarded. The court shall determine the amount and the method

Act to provide that distributions should be based on what is fair and equitable, regardless of which spouse has legal title to the property.<sup>119</sup> It reflects the view that marriage is a partnership, and each spouse is entitled to an equitable share of the partnership property upon dissolution of the marriage.<sup>120</sup>

In an early decision interpreting the Act, the Court of Appeals noted that the statutory term "marital property" encompassed by section 8-201(e) "embraces everything which has exchangeable value or goes to make up a man's wealth—every interest or estate which the law regards of sufficient value for judicial recognition."<sup>121</sup> The Court of Appeals has also stated that "when used without express or implied qualifications, [property] may reasonably be construed to . . . [involve] obligations, rights and other intangibles as

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of payment of a monetary award after considering each of the following factors:

- (1) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
- (2) the value of all property interests of each party;
- (3) the economic circumstances of each party at the time the award is to be made;
- (4) the circumstances that contributed to the estrangement of the parties;
- (5) the duration of the marriage;
- (6) the age of each party;
- (7) the physical and mental condition of each party;
- (8) how and when specific marital property was acquired, including the effort expended by each party in accumulating the marital property;
- (9) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and
- (10) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award.

*Id.*

119. See, e.g., *Unkle v. Unkle*, 305 Md. 587, 595, 505 A.2d 849, 853 (1986) (objectives of fair and equitable distribution necessitate abandoning Maryland's old title system of dividing marital property).

120. The preamble to Maryland's Marital Property Act states: "[m]arriage is a union between a man and a woman having equal rights under the law. Both spouses owe a duty to contribute his or her best efforts to the marriage, and both, by entering into the marriage, undertake to benefit both spouses . . . ." Act of May 29, 1978, ch. 794, 1978 Md. Laws 2305.

121. *Deering v. Deering*, 292 Md. 115, 125, 437 A.2d 883, 889 (1981) (quoting *Diffendall v. Diffendall*, 239 Md. 32, 36, 209 A.2d 914, 915 (1965)).

Section 8-201(e) provides:

- (1) "Marital property" means the property, however titled, acquired by 1 or both parties during the marriage.
- (2) Marital property does not include property:
  - (i) acquired before the marriage;
  - (ii) acquired by inheritance or gift from a third party;
  - (iii) excluded by valid agreement; or
  - (iv) directly traceable to any of these sources.

MD. FAM. LAW CODE ANN. § 8-201(e) (1984).

well as physical things.”<sup>122</sup>

The Court of Appeals includes under this broad definition of marital property: worker's compensation awards,<sup>123</sup> civilian retirement benefit rights accumulated during the marriage,<sup>124</sup> work-related contributory disability plans,<sup>125</sup> and future commissions on insurance renewal premiums.<sup>126</sup> On the other hand, professional degrees or licenses, and inchoate personal injury claims arising from an accident during the marriage, have not been included as marital property.<sup>127</sup>

If the court has found that the asset is marital property, it has determined that the asset represents an enforceable property right. For example, the right to receive money in the future is an enforceable property right, and thus is a marital asset.<sup>128</sup> The court noted that these assets have a present value, and are not mere conditional expectations.<sup>129</sup> It is insignificant that the right is contingent, or might be divested by some future event.<sup>130</sup>

On the other hand, when the court determines that the asset

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122. *Archer v. Archer*, 303 Md. 347, 356, 493 A.2d 1074, 1079 (1985) (quoting *Bouse v. Hutzler*, 180 Md. 682, 686, 26 A.2d 767, 769 (1942)).

123. *See Queen v. Queen*, 308 Md. 574, 521 A.2d 320 (1987) (marital property includes the portion of a worker's compensation award for a permanent disability representing the amount of lost wages).

124. *See Deering v. Deering*, 292 Md. 115, 437 A.2d 883 (1981) (marital property includes the right to receive retirement benefits acquired from efforts expended during the marriage).

125. *See Lookingbill v. Lookingbill*, 301 Md. 283, 483 A.2d 1 (1984) (disability payments represent deferred compensation for deductions from income during marriage, and therefore are marital property).

126. *See Niroo v. Niroo*, 313 Md. 226, 545 A.2d 35 (1988) (husband's right to receive insurance renewal commissions represented future compensation for efforts expended during the marriage, and therefore is marital property subject to distribution).

127. *See Archer v. Archer*, 303 Md. 347, 493 A.2d 1074 (1985) (a medical degree and license represent future earning capacity, and are not marital property); *Unkle v. Unkle*, 305 Md. 587, 505 A.2d 849 (1986) (spouse's unliquidated personal injury award arose from purely fortuitous circumstances, and not from either spouse's continuing efforts).

128. The right to receive pension benefits, disability payments, insurance renewal premiums, and worker's compensation benefits are all rights to receive money in the future, and are marital assets. *See infra* notes 123-126.

129. *See id.*; *Deering v. Deering*, 292 Md. 115, 127-28, 437 A.2d 883, 890 (1981) (citing *In re Marriage of Brown*, 15 Cal. 3d 838, 845, 544 P.2d 561, 565, 126 Cal. Rptr. 633, 637, (1976) (en banc)). In *Deering*, the court noted that pension benefits are a contractual right and rise above a mere expectancy into a chose in action, a form of property. *Id.*

130. *See Niroo v. Niroo*, 313 Md. 226, 236, 545 A.2d 35, 40 (1988) (the uncertainty of renewal commissions was insignificant); *Lookingbill v. Lookingbill*, 301 Md. 283, 289, 483 A.2d 1, 4 (1984) (the fact that the husband's disability payments were contingent on his health and earnings was not significant); *Deering*, 292 Md. at 128, 437 A.2d at 890 (it is insignificant that a pension benefit may be contingent upon continued employment).

has no present value, but merely represents future earning capacity, it is not a marital asset. In *Archer v. Archer*,<sup>131</sup> the court held that a medical degree or license was not marital property subject to distribution.<sup>132</sup> The professional degree and license did not possess any of the basic characteristics of property.

[I]t is but an intellectual attainment; it is not a present property interest. It is personal to the holder; it cannot be sold, transferred, pledged or inherited. It does not have an assignable value nor does it represent a guarantee of receipt of a set monetary amount in the future, such as pension benefits. Quite simply, a degree/license does not have an exchange value on an open market.<sup>133</sup>

Even though an asset is an enforceable property right, it may nonetheless be excluded from the marital estate if it is personal to the holder. In *Unkle v. Unkle*,<sup>134</sup> the Court of Appeals held that an unliquidated personal injury claim was not marital property because it was personal to the injured spouse.<sup>135</sup> The Court of Appeals rejected the majority view that marital property includes claims and awards for personal injuries incurred during the marriage.<sup>136</sup>

*b. Goodwill.*—Goodwill has been defined in many ways,<sup>137</sup> but Justice Story's definition is most often quoted:

[T]he advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or

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131. 303 Md. 347, 493 A.2d 1074 (1985).

132. See *id.* at 357, 493 A.2d at 1079.

133. *Id.*, 493 A.2d at 1080.

134. 305 Md. 587, 596, 505 A.2d 849, 854 (1986).

135. See *id.*

136. See *id.*

137. See *Hagan v. Dundore*, 187 Md. 430, 442, 50 A.2d 570, 576 (1947) (noting various definitions of goodwill, from "the probability that the old customers will resort to the old place," to "the good-will of a business comprises those advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and repute of his predecessor.').



prejudice.<sup>138</sup>

A commercial business's total worth includes the value of any goodwill.<sup>139</sup> Maryland courts recognize commercial goodwill as an asset that can be sold or transferred with the business.<sup>140</sup> Furthermore, when dividing marital assets upon a marriage's dissolution, courts generally include the value of commercial goodwill in a spouse's business.<sup>141</sup> This is consistent with the view adopted by the state's equitable property distribution schemes that marriage is a partnership.<sup>142</sup>

Controversy arises in considering whether a professional's goodwill is marital property when it is inherently tied to the professional's skills and talents. Most states treat professional goodwill similarly to commercial goodwill, including it as marital property for the purpose of distribution on divorce.<sup>143</sup> If the nonprofessional

138. J. STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE § 99, at 157 (7th ed. 1881).

139. Note, *Treating Professional Goodwill as Marital Property in Equitable Distribution States*, 58 N.Y.U. L. REV. 554, 561 (1983).

140. See *Schill v. Remington Putnam Book Co.*, 179 Md. 83, 89-90, 17 A.2d 175, 178 (1941) (in a breach of contract claim under the Fair Trade Act, goodwill is a property asset of the business existing apart from the commodity).

141. See Note, *supra* note 139, at 562. See generally T. OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 10.03[1] (1990) (general discussion on community goodwill and its valuation).

142. See *supra* note 120 and accompanying text.

143. See *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115 (1981) (professional practice in plastic surgery has a goodwill value subject to distribution upon divorce); *In re Marriage of Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974) (goodwill of a solo medical practice is marital property); *Golden v. Golden*, 270 Cal. App. 2d 401, 75 Cal. Rptr. 735 (1969) (solo medical practice's goodwill is marital property); *Mueller v. Mueller*, 144 Cal. App. 2d 245, 301 P.2d 90 (1956) (dental laboratory's goodwill is marital property); *In re Marriage of Nichols*, 43 Colo. App. 383, 606 P.2d 1314 (1979) (goodwill of a dental practice and other professional practices is marital property); *In re Marriage of White*, 98 Ill. App. 3d 380, 53 Ill. Dec. 786, 424 N.E.2d 421 (1981) (dental corporation's goodwill is marital property), *appeal after remand*, 151 Ill. App. 3d 778, 104 Ill. Dec. 424, 502 N.E.2d 1084 (1986); *Porter v. Porter*, 526 N.E.2d 219 (Ind. App. 1988) (corporate medical practice's goodwill is marital property); *Heller v. Heller*, 672 S.W.2d 945 (Ky. Ct. App. 1984) (accounting practice's goodwill is marital property); *Rethman v. Rethman*, 429 Mich. 867, 413 N.W.2d 679 (1987) (remanding for further testimony on value of a dental laboratory's goodwill); *Kowalesky v. Kowalesky*, 148 Mich. App. 151, 384 N.W.2d 112 (goodwill of a dental practice of unspecified form is marital property), *appeal denied*, 425 Mich. 876 (1986); *Hanson v. Hanson*, 738 S.W.2d 429 (Mo. 1987) (goodwill of an oral surgery partnership and other professional practices is a marital asset); *In re Marriage of Hull*, 219 Mont. 480, 712 P.2d 1317 (1986) (incorporated medical practice's goodwill is marital property); *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983) (solo law practice's goodwill is marital property); *Hurley v. Hurley*, 94 N.M. 641, 615 P.2d 256 (1980) (professional practice's goodwill is marital property), *overruled on other grounds by Ellsworth v. Ellsworth*, 97 N.M. 133, 637 P.2d 564 (1981); *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985) (dental practice's goodwill is marital

spouse contributed to the practice's value in the same way that a spouse might contribute to the acquisition of tangible assets, the spouse ought to be compensated for the goodwill just as he would be compensated for the increased value of stock in a family business.<sup>144</sup>

According to this view, it is unimportant whether the goodwill could actually be sold.<sup>145</sup> The professional spouse will continue to practice after the divorce, thereby realizing the goodwill's value.<sup>146</sup> It is no obstacle that the goodwill cannot be immediately realized; courts have held in other contexts that an asset need not be realized in order to constitute marital property.<sup>147</sup>

These cases distinguish goodwill from a professional degree or

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property); *Jondahl v. Jondahl*, 344 N.W.2d 63 (N.D. 1984) (tax service business's goodwill is marital property); *Goger v. Goger*, 27 Or. App. 729, 557 P.2d 46 (1976) (dental corporation's goodwill is marital property if the spouse was the sole shareholder); *Sorenson v. Sorenson*, 769 P.2d 820 (Utah App. 1989), *cert. granted*, 779 P.2d 688 (Utah 1989) (dental practice's goodwill is marital property); *In re Marriage of Fleege*, 91 Wash. 2d 324, 588 P.2d 1136 (1979) (solo dental practice's goodwill is marital property); *In re Lukens*, 16 Wash. App. 481, 558 P.2d 279 (1976) (solo osteopathy practice's goodwill is marital property).

Commentators support the majority view, and note that including professional goodwill in the marital estate is consistent with the policy behind equitable distribution. See L. GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* § 6.21, at 189 (1983 & Supp. 1990) ("If equitable distribution is to have vitality then [professional goodwill] must be included within its scope."). See generally Krauskopf, *Marital Property at Marriage Dissolution*, 43 Mo. L. REV. 157 (1978) (professional goodwill developed during the marriage should be included in the marital property, but courts must be careful not to count it twice in awarding alimony); Comment, *Identifying, Valuing, and Dividing Professional Goodwill as Community Property at Dissolution of the Marital Community*, 56 TUL. L. REV. 313 (1981) (an effective community property system must include professional goodwill); Note, *supra* note 139 (professional goodwill should be treated the same as commercial goodwill because both represent a valuable portion of the business's total worth). But see Note, *Professional Corporation May Have Valuable Goodwill, Apart from Person of Individual Member, That Must Be Considered in Property Settlement on Divorce*, 11 ST. MARY'S L.J. 222 (1979) (goodwill's existence and value should be determined using a case-by-case approach).

144. See *Golden v. Golden*, 270 Cal. App. 2d 401, 405, 75 Cal. Rptr. 735, 738 (1969) (sole medical practitioner's goodwill must be included in marital property because the spouse is entitled to be recompensed for his contribution to the practice).

145. See *Dugan v. Dugan*, 92 N.J. 423, 434, 457 A.2d 1, 6 (1983) ("An individual practitioner's inability to sell a law practice does not eliminate the existence of goodwill and its value as an asset to be considered in equitable distribution. Obviously, equitable distribution does not require conveyance or transfer of any particular asset.").

146. See *In re Marriage of Lukens*, 16 Wash. App. 481, 486, 558 P.2d 279, 282 (1976) (goodwill of the husband's osteopathic practice was subject to distribution in a divorce, and stating that "despite its unmarketability, [the husband] . . . will continue to receive a return on the goodwill associated with his name.").

147. See, e.g., *Niroo v. Niroo*, 313 Md. 226, 545 A.2d 35 (1988) (future commissions on insurance renewal premiums are marital property).

license by pointing out that goodwill is more than speculation as to future earning capacity.<sup>148</sup> Goodwill exists when "future earning capacity has been enhanced because reputation leads to probable future patronage from existing and potential clients . . . ."<sup>149</sup>

At the other extreme are states that equate professional goodwill with professional reputation.<sup>150</sup> According to traditional commercial goodwill theory, goodwill arising from an individual's reputation is considered future earning capacity, and is not divisible as marital property.<sup>151</sup>

Some states also have noted that, in contrast to commercial goodwill, professional goodwill cannot be sold.<sup>152</sup> These states reason that the goodwill can only be realized by the individual's continuing to practice. It is thus indistinguishable from future earning capacity, and is not a divisible asset.<sup>153</sup> This analogizes professional goodwill to professional degrees and licenses.

The case-by-case approach lies between these extremes. Courts adopting this view recognize that even a solo professional practice may sometimes have divisible goodwill if it exists apart from the owner's reputation.<sup>154</sup> In this regard, the practitioner's reputation is equated with ability to obtain future earnings. Because future earnings are not considered marital property, goodwill that represents only the owner's reputation is not marital property.<sup>155</sup>

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148. See cases cited *supra* note 143.

149. *Dugan*, 92 N.J. at 433, 457 A.2d at 6.

150. See, e.g., *Powell v. Powell*, 231 Kan. 456, 463, 648 P.2d 218, 223 (1982) (goodwill of husband's medical practice is not marital property); *Beasley v. Beasley*, 359 Pa. Super. 20, 36, 518 A.2d 545, 552 (1986) (sole proprietorship's goodwill, as distinguished from that of a corporation, is not marital property), *allocatur denied*, 516 Pa. 631, 533 A.2d 90 (1987); *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972) (goodwill is not marital property if it is not an earned or vested right, or one that gives any fixed future benefit); *Holbrook v. Holbrook*, 103 Wis. 2d 327, 350, 309 N.W.2d 343, 355 (1981) (goodwill of husband's partnership interest in law firm is not marital property).

151. See T. OLDHAM, *supra* note 141, at § 10.03[3][b].

152. See, e.g., *Beasley*, 359 Pa. Super. at 35, 518 A.2d at 552; *Nail*, 486 S.W.2d at 764; *Holbrook*, 103 Wis. 2d at 350, 309 N.W.2d at 355.

153. See *supra* note 152. In *Holbrook*, the court summarized the minority view. See 103 Wis. 2d at 350-51, 309 N.W.2d at 353-54.

154. See, e.g., *Richmond v. Richmond*, 779 P.2d 1211, 1213 (Alaska 1989) (only marketable goodwill will be included in the marital estate); *Wilson v. Wilson*, 294 Ark. 194, 205-06, 741 S.W.2d 640, 646-74 (1987) (the goodwill of a corporation in which the husband owns one third of the stock is only distributable if salable or marketable); *Antolik v. Harvey*, 7 Haw. App. 313, 308-09, 761 P.2d 305, 308-08 (1988) (a chiropractic business's professional goodwill is marital property only if found to be marketable); *Taylor v. Taylor*, 222 Neb. 721, 731-32, 386 N.W.2d 851, 858-59 (1986) (a medical laboratory's goodwill is divisible marital property when it is distinct from the doctor's reputation).

155. See *supra* note 154.

3. *Analysis.*—After reviewing these three positions, the Court of Appeals held that because it has no value apart from the practitioner's reputation, a solo law practice's professional goodwill is not marital property.<sup>156</sup> Although *Prahinski* placed a solo law practice's goodwill in the nonmarital property category, along with personal injury claims and professional degrees and licenses,<sup>157</sup> the court did not analogize its decision to these prior rulings. Nor did it distinguish cases in which the asset was found to be marital property. Most notably, the court did not discuss how its decision fit in with the Marital Property Act's policy objectives.<sup>158</sup> Instead of placing *Prahinski* within the existing marital property framework, the court centered its analysis on the unique features of legal practice.<sup>159</sup>

The court identified three possible grounds to support its conclusion that goodwill of a solo law practice is not marital property. First, it equated goodwill with professional reputation, and then found that a professional's reputation is personal to the professional and therefore, not divisible as marital property.<sup>160</sup> The dissent noted, however, that this rationale is not limited to legal practice and would (and perhaps should) apply to all professionals.<sup>161</sup> There is no reason to distinguish a lawyer's goodwill from that of a dentist or doctor because in each case, goodwill is inherently tied to the

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156. See *Prahinski*, 321 Md. at 239, 582 A.2d at 790.

157. See *supra* note 127 and accompanying text. Although the court did not expressly state that a solo law practice's goodwill can never be marital property, it said that it is "personal to the individual practitioner . . . . We are not convinced that the goodwill of a solo law practice can be separated from the reputation of the attorney." *Prahinski*, 321 Md. at 239, 582 A.2d at 790. In light of the court's position that "reputation" is not marital property, the only reasonable conclusion to draw from these two statements is that a solo law practice's professional goodwill can never be marital property.

158. The commission that wrote the original equitable distribution statute stated that its goal was to achieve an equitable distribution of all the marital assets, based upon both spouses' monetary and nonmonetary contributions. REPORT OF THE GOVERNOR'S COMMISSION ON DOMESTIC RELATIONS LAW 5 (Jan. 1978). In the great majority of cases in which the court has applied the Marital Property Act, particularly those in which it has been faced with determining whether an asset should be included in "marital property," the court compared the import of its decision with the Act's objectives. See *supra* note 104.

159. See *infra* notes 165-185 and accompanying text.

160. See *Prahinski*, 321 Md. at 239, 582 A.2d at 790.

161. See *id.* at 244, 582 A.2d at 792 (Rodowsky, J., dissenting). The rationale that goodwill must be an asset with value independent of the practitioner's reputation has been adopted in cases involving solo law practitioners, *Beasley v. Beasley*, 359 Pa. Super. 20, 518 A.2d 545 (1986), law firms, *Richmond v. Richmond*, 779 P.2d 1211 (Alaska 1989), chiropractic businesses, *Antolik v. Harvey*, 7 Haw. App. 313, 761 P.2d 305 (1988), and a medical laboratory business, *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986).

practitioner's skill and reputation.<sup>162</sup> Furthermore, according to the dissent, this rationale would also preclude goodwill from being characterized as marital property in a case involving a sole proprietor engaged in a service business. "Where services are involved a reputation for competently rendering the particular service is a component of goodwill whether we deal with a trade, a business, or a profession."<sup>163</sup> The dissent found this particularly troubling because the type of nonmonetary support provided by a spouse to make it possible for the working spouse to develop a business reputation is exactly what the Marital Property Act is designed to cover.<sup>164</sup>

It is unclear whether the court will extend this rationale to other professionals and sole proprietors. Much of the uncertainty arises because the court's finding was grounded in the Rules of Professional Conduct for Lawyers.<sup>165</sup> Under the Rules, a lawyer is responsible for all of the work going out of the office.<sup>166</sup> By placing his signature on the work, the attorney assumes liability for its accuracy and authenticity.<sup>167</sup> According to the court, it is this professional assurance that creates the goodwill.<sup>168</sup> Because this assurance would end if the practitioner withdrew from the solo practice, the goodwill generated is personal, and not the kind of asset that can be divided.<sup>169</sup>

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162. See *Powell v. Powell*, 231 Kan. App. 2d 456, 463, 648 P.2d 218, 223 (1982) (a doctor's goodwill is not a marital asset subject to distribution on divorce). The court stated that: "[t]he very nature of a professional practice is that it is totally dependent upon the professional." *Id.*

163. *Prahinski*, 321 Md. at 244, 582 A.2d at 792 (Rodowsky, J., dissenting).

164. See *id.* The dissent agreed with the Court of Special Appeals. "If, in fact, goodwill exists, it would be inequitable to ignore the contribution of the attorney's spouse to the development of that goodwill during the marriage." *Prahinski v. Prahinski*, 75 Md. App. 113, 130, 540 A.2d 833, 841 (1988).

165. See *Prahinski*, 321 Md. at 239, 582 A.2d at 790; THE MARYLAND LAWYER'S RULES OF PROFESSIONAL CONDUCT 5.3(c) (1990).

166. THE MARYLAND LAWYER'S RULES OF PROFESSIONAL CONDUCT 5.3(c) (1990).

167. See *Prahinski*, 321 Md. at 239-40, 582 A.2d at 790. No other decision surveyed herein relied on the fact that lawyers must sign the work that comes out of their offices to hold that goodwill is personal to that practitioner.

168. See *id.*

169. *Id.* For many courts holding that professional goodwill is not a marital asset, a key factor was that the professional goodwill would cease to exist on the practitioner's death or retirement. See *Powell v. Powell*, 231 Kan. App. 2d 456, 463, 648 P.2d 218, 223 (1982) (goodwill of a doctor's practice is not a divisible marital asset—"when he or she dies or retires nothing remains"); *Beasley v. Beasley*, 359 Pa. Super. 21, 35, 518 A.2d 545, 552 (1986) (goodwill of a solo law practice is not marital property—"[w]hen a sole proprietor terminates his activity, the lights go out, the value of the sole proprietorship is extinguished . . .").

The majority failed to recognize that any sole proprietorship, professional or not, depends on the skilled practitioner's continued presence.<sup>170</sup> Every solo practice creates its goodwill by providing quality assurance and reliability. It is not the attorney's signature, but customer satisfaction generated by the practitioner's skill, that creates the goodwill.

The second basis of the court's holding is that goodwill is not marital property because it is not a salable asset and has no commercial value.<sup>171</sup> Unlike other professionals, a lawyer "may not covenant to abstain from the practice of law, and therefore, may not sell his or her goodwill."<sup>172</sup> A lawyer's goodwill has no commercial value because it is not an asset that can be sold, and thus it is not marital property.<sup>173</sup>

This marketability requirement was first announced in *Archer*, in which the court found that a professional degree was not marital property because it was not assignable, transferable, or inheritable, and it could not be sold.<sup>174</sup> Because it could not be sold or transferred, the degree merely represented future earning capacity.<sup>175</sup> In the wake of *Archer* and *Prahinski*, it appears that the court views salability as an essential characteristic of marital property. If this is the case, the court's holding could apply to law partnerships and corporations. A partner's share of a law firm's goodwill cannot be exchanged on an open market—it cannot be assigned, sold, transferred, or pledged.<sup>176</sup>

This reasoning is troublesome because it fails to distinguish professional goodwill from other sorts of nonsalable assets that courts include as marital property. For example, the Court of Special Appeals has determined that stock options are marital property even though they cannot be assigned or sold.<sup>177</sup> By relying on the nonsalable nature of the solo law practice, the court failed to recog-

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170. See Note, *supra* note 139, at 563-64.

171. See *Prahinski*, 321 Md. at 240-41, 582 A.2d 790-91. Nonmarketability is the most often cited reason for excluding professional goodwill from the marital estate. See, e.g., *Wilson v. Wilson*, 294 Ark. 194, 205-06, 741 S.W.2d 640, 646-47 (1987); *Antolik v. Harvey*, 7 Haw. App. 313, 761 P.2d 305 (1988); *Holbrook v. Holbrook*, 103 Wis. 2d 327, 350, 309 N.W.2d 343, 355 (1981).

172. *Prahinski*, 321 Md. at 240, 582 A.2d at 790.

173. *Id.*

174. See 303 Md. 347, 357, 493 A.2d 1074, 1080 (1985); *supra* notes 131-133 and accompanying text.

175. See *Archer*, 303 Md. at 357, 493 A.2d at 1080.

176. See *Holbrook v. Holbrook*, 103 Wis. 2d 327, 350, 309 N.W.2d 343, 355 (1981).

177. See *Green v. Green*, 64 Md. App. 122, 136-37, 494 A.2d 721, 728 (1985) (restricted stock options are marital property, and, "[while an] unsalable option has no fair

nize that although professional goodwill may not ethically be sold, it nonetheless is an economic resource of considerable value to practitioners.<sup>178</sup>

The third basis of the majority's holding rested on rule 5.4 of the Rules of Professional Conduct.<sup>179</sup> Rule 5.4 prohibits a lawyer from forming a partnership with a nonlawyer for the purpose of practicing law.<sup>180</sup> The court ruled that this precluded Margaret from claiming a partner's interest in Leo's practice.<sup>181</sup> Because Margaret cannot claim a partnership interest in the solo practice, its goodwill may not be included as marital property.<sup>182</sup>

Rule 5.4(d) "prevent[s] business relationships with non-lawyers from compromising a lawyer's independence of thought and action."<sup>183</sup> But under Maryland's equitable distribution statute, courts do not disturb ownership or title of marital property.<sup>184</sup> By recognizing professional goodwill as a marital asset, courts merely take into account all of each parties' economic resources in order to

market value, it is nonetheless an economic resource . . . to which a value can be attributed.").

178. In *Dugan v. Dugan*, 92 N.J. 423, 434, 457 A.2d 1, 6 (1983), the court held that a solo law practice's goodwill is marital property. See *supra* note 145 and accompanying text; accord, *In re Marriage of Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974) (because a professional practice continues to benefit from the same goodwill developed during the marriage, it is a marital asset subject to distribution).

179. See *Prahinski*, 321 Md. at 241, 582 A.2d at 791.

180. See THE MARYLAND LAWYER'S RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1990). Rule 5.4 provides in relevant part:

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

....

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if;

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

*Id.*

181. See *Prahinski*, 321 Md. at 241, 582 A.2d at 791. No other jurisdiction holding that a solo law practitioner's professional goodwill is not marital property relied on rule 5.4 to sustain its holding.

182. *Id.*

183. G. HAZARD, JR. & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 476 (Supp. 1988).

184. See MD. FAM. LAW CODE ANN. § 8-202(a)(3) (1984). "The court may not transfer the ownership of personal or real property from 1 party to the other." *Id.* See *Ward v. Ward*, 48 Md. App. 307, 311, 426 A.2d 443, 446 (1981) (§ 3-6A-04(a) [the predecessor of § 8-202(a)(3)] "flatly forbids" the court from transferring ownership of property).

make an equitable monetary award. Nonprofessional spouses do not receive a legal interest in practices, but equitable interests for the purpose of granting a monetary award.<sup>185</sup> It is unclear how awarding this equitable interest would compromise the attorney's independence of thought and action.

Moreover, this results in a strange distinction between lawyer and nonlawyer spouses. Presumably, because rule 5.4(d) only prohibits business relationships with nonlawyers, a solo law practitioner's spouse who is also a lawyer would be entitled to claim an equitable interest in the law practice's goodwill.

4. *Conclusion.*—Although the Court of Appeals' decision that goodwill was not a divisible marital asset is limited to solo law practices,<sup>186</sup> the core of the court's opinion would apply equally to the goodwill of any trade, business, or practice providing a service to customers.<sup>187</sup> The supporting rationales that the court used to limit its holding are insufficient to distinguish lawyers from doctors, and sole proprietorships from corporations. What remains to be seen is whether these seemingly minor and misplaced distinctions will survive when the court faces a case involving the goodwill of a different professional, or of a sole proprietor.

TERESA L. SOMMERFIELD  
LINDA J. JENNINGS

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185. See MD. FAM. LAW CODE ANN. § 8-205(a).

186. See *Prahinski*, 321 Md. at 239, 582 A.2d at 790.

187. See *id.* at 244, 582 A.2d at 792 (Rodowsky, J., dissenting). See *supra* notes 161-164 and accompanying text.



## VIII. GOVERNMENTAL FUNCTIONS

### A. *Impact Fees and Local Taxing Authority*

In *Eastern Diversified Properties, Inc. v. Montgomery County*,<sup>1</sup> the Court of Appeals held that Montgomery County's development impact fee<sup>2</sup> was a tax and not a regulatory fee, and that the county lacked authority to impose such a tax.<sup>3</sup> In delivering the opinion, Chief Judge Murphy reversed the Montgomery County Circuit Court's opinion, which held that the impact fees were part of the county's regulatory process and were imposed pursuant to its home rule powers.<sup>4</sup> The court reasoned that because the development impact fee was collected primarily to raise revenue, and no further regulatory conditions were imposed, the fees were a tax that the County had no authority to impose pursuant to its enumerated powers.<sup>5</sup>

The *Eastern Diversified* decision prohibits charter counties from imposing impact fees in the absence of specific state authority.<sup>6</sup> In so ruling, the court conformed to precedent in determining whether a governmental fee is part of a regulatory measure, or a revenue measure amounting to a tax.<sup>7</sup> But the court's decision that Montgomery County lacked authority to impose the impact fee as a tax completely ignored Montgomery County Code section 52-17, in which the State empowered the County to tax to the same extent that the state does.<sup>8</sup> This omission leaves unresolved section 52-

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1. 319 Md. 45, 570 A.2d 850 (1990).

2. Developers pay development impact fees to defray some of the costs of upgrading infrastructures, such as roads and highways, so that they can accommodate the increased burdens that new developments create. See generally Eveleth, *The Cost of Growth: Impact Fees*, Md. B.J., Mar.-Apr. 1988, at 16; Tiburzi, *Impact Fees in Maryland*, 17 U. BALT. L. REV. 502 (1988). For additional commentary on *Eastern Diversified*, see Tiburzi, *Imposing Impact Fees*, Md. B.J., July-Aug. 1990, at 26.

In response to the county's rapid growth rate, the Montgomery County Council enacted chapter 49A, entitled "Development Impact Fees for Major Highways," to finance road construction by imposing fees on new developments within the "planning policy areas." See MONTGOMERY COUNTY, MD., CODE ch. 49(A), §§ 1-14 (1984).

3. See 319 Md. at 55, 570 A.2d at 854-55.

4. See *id.* at 47-48, 570 A.2d at 854-55.

5. See *id.* at 55, 570 A.2d at 855. The Express Powers Act limits Montgomery County's taxation powers. See MD. ANN. CODE art. 25A, § 5(O) (1987). See *infra* notes 14-21 and accompanying text.

6. See *infra* text accompanying notes 27-29.

7. See *infra* text accompanying notes 30-36.

8. See MONTGOMERY COUNTY, MD., CODE § 52-17 (1984); *infra* text accompanying notes 37-48.

17's viability. Finally, the court failed to address the reasonableness of development impact fee amounts.<sup>9</sup>

1. *The Case.*—Eastern Diversified Properties, Inc. (Diversified) obtained approval of a proposed subdivision plat from the Maryland-National Capital Park and Planning Commission, and sought a building permit from the Montgomery County Department of Environmental Protection.<sup>10</sup> The Department of Environmental Protection approved the building permit on the condition that Diversified pay a \$118,006 development impact fee in accordance with Montgomery County Code chapter 49A.<sup>11</sup> Diversified appealed to the County Board of Appeals, which concluded that the impact fee was a valid regulatory fee and not a tax, and dismissed the appeal. Diversified then appealed to the Circuit Court for Montgomery County, which affirmed the County Board of Appeals' decision.<sup>12</sup> The Court of Appeals granted certiorari to consider the issue prior to argument in the Court of Special Appeals.<sup>13</sup>

2. *Legal Background and the Court's Reasoning.*—

a. *Charter County's Home Rule Powers.*—Article XI-A, section 2, of the Maryland constitution requires the General Assembly to provide a grant of express powers to counties that elect to establish a charter form of government.<sup>14</sup> Pursuant to section 2, the General Assembly passed the Express Powers Act,<sup>15</sup> which defines and governs the home rule powers permitted to charter counties.<sup>16</sup>

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9. See *infra* text accompanying notes 49-51.

10. *Eastern Diversified*, 319 Md. at 46-47, 570 A.2d at 851.

11. *Id.*; see MONTGOMERY COUNTY, MD., CODE ch. 49(A) (1984). The county code states that:

Imposing a development impact fee that requires new development in certain impact fee areas to pay their pro rata share of the costs of impact highway improvements necessitated by such new development in conjunction with other public funds is a reasonable method of raising the funds to build such improvements in a timely manner.

*Id.* ch. 49A-2(f).

12. *Eastern Diversified*, 319 Md. at 48, 570 A.2d at 851.

13. *Id.*

14. See MD. CONST. art. XI-A, § 2. The chartered counties are: Anne Arundel, Baltimore, Harford, Howard, Montgomery, Prince George's, Talbot, and Wicomico.

15. MD. ANN. CODE art. 25A, § 5 (1987).

16. The Maryland Constitution provides that the charter county "subject to the Constitution and Public General Laws of this State . . . shall have full power to enact local laws of said . . . county including the power to repeal or amend local laws of . . . [the] county enacted by the General Assembly, upon all matters covered by the express powers granted," with certain exceptions. MD. CONST. art. XI-A, § 3.

The Maryland Code also establishes code counties (Allegany, Caroline, Kent, and

Section 5(O) of the Express Powers Act authorizes a charter county to impose and collect property taxes.<sup>17</sup> But this section has not been interpreted as granting broad taxation powers to the charter counties.<sup>18</sup>

Section 5(S) of the Express Powers Act states that the enumeration of specific powers shall

not be held to limit the power of the county council . . . , to pass all ordinances, resolutions or bylaws, not inconsistent with the provisions of this article or the laws of the State, as may be proper in executing and enforcing any of the powers enumerated . . . , as well as such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county.<sup>19</sup>

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Worcester) whose powers derive from article XI-F of the Maryland constitution. These counties enjoy limited home rule powers. *See* MD. ANN. CODE art. 25B, § 13 (1987). Code counties need the General Assembly's express authorization to impose new taxes or fees. *See id.* § 9. No code counties are authorized to impose development impact fees. County commissioner counties (Calvert, Carroll, Cecil, Charles, Dorchester, Frederick, Garrett, Queen Anne's, St. Mary's, Somerset, and Washington) have no home rule powers. *See* MD. ANN. CODE art. 25, § 1 (1987). Seven commissioner counties are authorized to impose impact fees or similar fees thereof. *See* Act of May 29, 1990, ch. 468, 1990 Md. Laws 1908 (Frederick); Act of May 29, 1990, ch. 543, 1990 Md. Laws 2373 (Washington); Act of May 17, 1988, ch. 410, 1988 Md. Laws 3132 (Queen Anne's); Act of Apr. 14, 1987, ch. 108, 1987 Md. Laws 536 (Carroll); Act of May 14, 1987, ch. 326, 1987 Md. Laws 1895 (Calvert); Act of May 31, 1974, ch. 814, 1974 Md. Laws 2729 (St. Mary's); Act of May 21, 1973, ch. 642, 1973 Md. Laws 1291 (Charles). *See also* Tiburzi, *Impact Fees in Maryland*, *supra* note 2, at 506-11; Moser, *County Home Rule—Sharing the State's Legislative Power with Maryland Counties*, 28 Md. L. Rev. 327 (1968).

17. *See* MD. ANN. CODE art. 25A, § 5(O) (1987). Property taxes are taxes imposed according to the land's value for the purposes of paying principal and interest on county loans, creating sinking funds to meet the loan liabilities, and financially supporting the county government. *See id.*

18. *See* *Montgomery County Bd. of Realtors, Inc. v. Montgomery County*, 287 Md. 101, 106-07, 411 A.2d 97, 100 (1980). Nevertheless, § 5(O) does not "cover the entire field of taxation . . . so as to bar any local legislation by the General Assembly on that subject." *Montgomery County v. Maryland Soft Drink Ass'n*, 281 Md. 116, 130, 377 A.2d 486, 493 (1977). As a result, the General Assembly can enact public local laws regarding taxation that apply to only one county, since article XI-A, § 4 of the Maryland constitution prohibits local laws from being enacted only when they attempt to legislate any subject "covered" by the Express Powers Act.

The legislature retains a right to enact local legislation permitting chartered counties to create other forms of taxes. *See Reinhardt v. Anne Arundel County*, 31 Md. App. 355, 373, 356 A.2d 917, 927, *cert. denied*, 278 Md. 731 (1976). In fact, the State passed such an enabling law, codified as MONTGOMERY COUNTY CODE § 52-17, *see infra* notes 37-48 and accompanying text, which grants Montgomery County taxation powers within the county to the same extent as the taxation powers of the State, with certain exceptions.

19. MD. ANN. CODE art. 25A, § 5(S) (1987). Charter county police powers are limited to the extent that public general law does not already provide for the particular powers. *Id.*

Under this section of the statute, charter counties are granted broad police powers, one of which is the right to impose "license taxes" or fees for regulatory purposes.<sup>20</sup> Maryland courts interpret this general grant of power as requiring liberal construction in order to create wide discretion in a county's exercise of police power.<sup>21</sup>

*b. Determining Whether Fee is a Valid Regulatory Fee.*—A county's authority to impose a particular fee depends upon whether the fee is classified as part of a regulatory scheme, or as a revenue raising measure amounting to a tax.<sup>22</sup> When deciding a fee's proper classification, courts look to its actual purpose, rather than to how it is labeled.<sup>23</sup> A regulatory fee's main purpose is to exact compliance with a governmental scheme, and it usually requires that certain other conditions be met in addition to payment of the prescribed sum.<sup>24</sup> Conversely, a tax is a charge imposed primarily to raise revenue, and has few or no other conditions that must be satisfied.<sup>25</sup> Finally, if the fee's amount has little relation to the claimed regulatory measure's purpose, the court is more likely to consider it a tax.<sup>26</sup>

*c. The Court's Reasoning.*—By holding that the Montgomery County impact fee was a tax, the Court of Appeals suggested that impact fees are to be considered taxes rather than regulatory fees. Consequently, a charter county cannot levy impact fees unless the General Assembly gives it specific authorization to do so.<sup>27</sup> The court's decision cannot be considered a surprise, given past com-

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20. See *Maryland Theatrical Corp. v. Brennan*, 180 Md. 377, 381, 24 A.2d 911, 913 (1942).

21. See *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 160-61, 252 A.2d 242, 247 (1969).

22. See *Campbell v. City of Annapolis*, 289 Md. 300, 304-05, 424 A.2d 738, 741 (1981); *Anne Arundel County v. English*, 182 Md. 514, 520, 35 A.2d 135, 138-39 (1943); *Maryland Theatrical*, 180 Md. at 380-82, 24 A.2d at 913-14.

23. See *Campbell*, 289 Md. at 305, 424 A.2d at 741. A regulatory fee may have incidental revenue raising effect. This will not change the fee's nature provided that "the amount [is] reasonable and [has] some definite relation to the purpose of the [fee]." *Maryland Theatrical*, 180 Md. at 381, 24 A.2d at 914. Likewise, revenue measures may have incidental regulatory effects, but the measures are still taxes if their main purpose is revenue raising. See *id.*

24. See *Maryland Theatrical*, 180 Md. at 381-82, 24 A.2d at 914. Courts have held that a fee collected pursuant to the police power cannot be greater than is necessary to carry out its provisions. See *id.* at 385, 24 A.2d at 914.

25. See *id.* at 381-82, 24 A.2d at 914.

26. See *id.* at 381, 24 A.2d at 914.

27. See 319 Md. at 55, 570 A.2d at 855.

mentary to that effect,<sup>28</sup> and the attempts of several counties to obtain such authorization.<sup>29</sup> Indeed, it now appears that any controversy regarding a charter county's authority to impose impact fees pursuant to its enumerated or home rule powers will be settled against the charter county.

The court arrived at its decision by applying criteria developed in previous cases. The court found that three specific aspects of the Montgomery County impact fee statute suggest the fee is more properly classified as a tax than a regulatory fee: revenue raising measures were implemented without a regulatory purpose;<sup>30</sup> fees were not charged solely on the basis of service provided to the property owner or for meeting expenses of the development regulatory process;<sup>31</sup> and the developer need meet no additional conditions.<sup>32</sup>

The court concluded that the fee was a tax even though the fees were to be used only for road construction in the areas from which they were collected.<sup>33</sup> Thus, earmarking the funds does not alter their revenue raising character. Indeed, the fact that the revenues would be used for public purposes that directly benefit the proposed development comports with the general notion that a tax is an exaction from a taxpayer for a public good.

The court quoted at length from *Maryland Theatrical Corp. v. Brennan*, in which it set forth specific "criteria for determining whether a governmental charge is a fee (regulatory measure) or a tax (revenue measure)."<sup>34</sup> The court in *Maryland Theatrical* recognized the necessary overlap, but distinguished the two as follows:

In general . . . when it appears from the Act itself that revenue is its main objective, and the amount of the tax sup-

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28. See Tiburzi, *Impact Fees in Maryland*, *supra* note 2, at 509.

29. Before the court rendered the *Eastern Diversified* decision, Prince George's County, Harford County, Howard County, and Washington County attempted to pass impact fee legislation during the 1990 legislative session. Prince George's and Washington counties were successful. See Act of May 29, 1990, ch. 543, 1990 Md. Laws 2373 (Washington County); Act of May 29, 1990, ch. 596, 1990 Md. Laws 2619 (Prince George's County). Charles County obtained impact fee authorization from the General Assembly during the 1989 legislative session. See Act of Apr. 11, 1989, ch. 43, 1989 Md. Laws 1616. Anne Arundel County obtained impact fee authorization during the 1986 legislative session. See Act of May 13, 1986, ch. 350, 1986 Md. Laws 1365. For more discussion of the successful and unsuccessful impact fee proposals introduced in the Maryland General Assembly, see Tiburzi, *Imposing Impact Fees*, *supra* note 2, at 26-27.

30. See *Eastern Diversified*, 319 Md. at 54-55, 570 A.2d at 855. The statute states that the fees are "a reasonable method of raising funds." See *supra* note 11.

31. See *Eastern Diversified*, 319 Md. at 54-55, 570 A.2d at 855.

32. See *id.* at 55, 570 A.2d at 855.

33. See *id.* at 54, 570 A.2d at 854; MONTGOMERY COUNTY, MD., CODE § 49A-8 (1984).

34. 319 Md. at 53, 570 A.2d at 854.

ports that theory, the enactment is a revenue measure . . . [but] where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power.<sup>35</sup>

Since the Montgomery County act flatly states that "imposing a development impact fee . . . is a reasonable method of raising the funds,"<sup>36</sup> and imposes upon developers no regulatory requirements, the fees appear to fall more precisely into the category of taxes.

3. *Analysis.*—The decision that impact fees are taxes should not have ended the court's discussion of the issue. The court failed to discuss section 52-17 of the Montgomery County Code,<sup>37</sup> which gave the Montgomery County Council taxation powers to the extent that the state exercised such powers.<sup>38</sup> This gap in the court's reasoning creates confusion as to the effect of section 52-17 on Montgomery County's taxation powers, the only county to have such powers. Absent a discussion of whether section 52-17 allows or contemplates an impact fee, the home rule basis of the court's decision that the impact fee is a tax is insufficient to support a conclusion that Montgomery County has no authority to impose this fee. Indeed, in Montgomery County's case, the issue should not simply be whether it is a valid regulatory fee or an invalid tax; rather, if it is not a valid regulatory fee, a second issue that must be analyzed is whether the tax comes under one of section 52-17's exceptions,<sup>39</sup> or whether it is a property tax that is valid pursuant to the express powers.<sup>40</sup>

In a cryptic footnote at the end of its decision,<sup>41</sup> the court inexplicably stated that it did not decide "whether the tax in this case is

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35. *Maryland Theatrical Corp. v. Brennan*, 180 Md. 381, 24 A.2d 911, 914 (1942).

36. *MONTGOMERY COUNTY, MD.*, CODE ch. 49A-2(f) (1984).

37. *See id.* § 52-17 (1984).

38. Section 52-17 provides:

(a) *Generally.* The county council is hereby empowered and authorized to have and exercise, within the limits of the county, in addition to any and all taxing powers theretofore granted by the general assembly, the power to tax to the same extent as the state has or could exercise such power within the limits of the county as part of its general taxing power.

*MONTGOMERY COUNTY, MD.*, CODE § 52-17 (1984).

39. Section 52-17 lists exceptions, none of which seem to cover the fee at issue in this case. *See id.* § 52-17(b).

40. *See supra* note 17.

41. *See* 319 Md. at 55 n.4, 570 A.2d at 855 n.4.

an excise, a property, or another type of tax.”<sup>42</sup> Even if section 52-17 did not exist, the court still should have decided whether the impact fee was a valid property tax. Although it is unlikely that the fee at issue in this case could fall within the definition of a property tax,<sup>43</sup> this confusing footnote highlights the court’s failure to consider the impact fee’s legality once it determined the fee’s status as a tax.

The court’s holding that “Chapter 49A thus imposes a tax which Montgomery County is without authority to enact,”<sup>44</sup> ignores section 52-17’s existence and contradicts the court’s previous holding in *Montgomery County v. Maryland Soft Drink Association*.<sup>45</sup> In that case, the Court of Appeals said that section 52-17 did not violate the Express Powers Act prohibitions “by granting the County the power to impose additional forms of taxation beyond the property tax.”<sup>46</sup> Of course, the question that arises is just what type of tax section 52-17 contemplates if not the development impact fee at issue here?

For purposes of imposing impact fees, the point is moot. During the 1990 legislative session the General Assembly passed a bill, subsequently signed into law by the Governor, that added to section 52-17 the power to impose development impact “taxes.”<sup>47</sup> It is unclear why the authority to impose a specific tax did not exist under section 52-17 as it read at the time of the disposition of *Eastern Diversified*. Section 52-17 is meaningless if the General Assembly must grant specific authority for any new tax proposed by the county. No rule of statutory construction permits such a reading.<sup>48</sup> In addition,

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42. *Id.*

43. See *supra* note 17 for a description of what constitutes a property tax.

44. 319 Md. at 55, 570 A.2d at 855. Although both parties briefed the § 52-17 issue, the County argued that *Diversified* failed in the lower courts to preserve the issue for appeal. The Court of Appeals did not indicate whether this was why it did not consider § 52-17. Regardless of when the parties raised the issue, the court ought not to have issued without comment or explanation a holding that seems at odds with existing law.

45. See 281 Md. 101, 377 A.2d 486 (1977).

46. *Id.* at 130, 377 A.2d at 494.

47. See Act of May 29, 1990, ch. 707, 1990 Md. Laws 2926. This act repealed and reenacted, with amendments, § 52-17. The amended version states that the county council is

empowered . . . to have and exercise, . . . in addition to any and all taxing powers heretofore granted . . . , the power to tax to the same extent as the state . . . , which includes the power to impose and provide for the collection of development impact taxes for financing, in whole or in part, the capital costs of additional or expanded public transportation facilities required to accommodate new construction or development; . . . .

*Id.* (emphasis added to show addition).

48. See *Prince George's County v. Chillum-Adelphi*, 275 Md. 374, 383, 340 A.2d 265, 271 (1975) (“courts will prefer the construction which will result in . . . the effectiveness

the fact that the impact "fee" has resurfaced as an impact "tax" under the new section 52-17 makes the question even more puzzling. Unfortunately, the court's failure to discuss section 52-17 creates serious questions for any future fee or taxes that Montgomery County may attempt to impose under section 52-17.

Because the court invalidated the Montgomery County impact fee, it did not need to consider the reasonableness of the amount of such fees. Consequently, there is no Maryland appellate case law on this issue.<sup>49</sup> One commentator suggested that the best evidence of an impact fee's reasonableness would be an independent rate study to analyze the reason for the charge, and to determine the costs that the fee will finance.<sup>50</sup> Several bills passed by the General Assembly in recent years include ceilings on the amount of money per residential unit that a county can impose as an impact fee.<sup>51</sup> It is likely that the courts will not specifically address the issue unless or until a particular county is charged with imposing an unreasonable impact fee.

4. *Conclusion.*—The holding in *Eastern Diversified*, that the development impact fee as imposed by Montgomery County is an invalid tax,<sup>52</sup> is rendered somewhat inconsequential by the General Assembly's recent enactment authorizing Montgomery County to impose such fees.<sup>53</sup> If one accepts the court's implication that impact fees are inherently tax-like and require specific state authorization, then the General Assembly must continue its slow county-by-county approach. The court's analysis suggests that it would be impossible to construct an impact fee that is a valid regulatory measure. The court's inexplicable failure to address the effect of section 52-17 on Montgomery County's "taxing" effort leaves that statute in limbo. Finally, the criteria for determining what constitutes a valid impact fee formula awaits later determination.<sup>54</sup>

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of the statutory provision being construed, rather than to adopt a construction which would make such provision . . . nugatory").

49. See Tiburzi, *Imposing Impact Fees*, *supra* note 2, at 528.

50. See Tiburzi, *Impact Fees in Maryland*, *supra* note 2, at 515.

51. The maximum amount of impact fees per unit in Charles County is \$3500. See Act of Apr. 11, 1989, ch. 43, 1989 Md. Laws 1616. The maximum amount of impact fees per unit in Prince George's County is \$1100, and revenue generated from impact fees may not exceed one-half the cost of the project. See Act of May 29, 1990, ch. 596, 1990 Md. Laws 2616.

52. See *supra* notes 30-36 and accompanying text.

53. See *supra* note 47 and accompanying text.

54. See *supra* notes 49-51 and accompanying text.



*B. Local Employment Discrimination Remedies and Express Powers Authority*

In *McCrory Corp. v. Fowler*,<sup>55</sup> the Court of Appeals held that a Montgomery County ordinance<sup>56</sup> that created a private cause of action for unlimited damages as a remedy for employment discrimination, was not a "local law" under the Maryland constitution's Home Rule Amendment.<sup>57</sup> The court found, therefore, that the County exceeded its delegated authority under the Express Powers Act.<sup>58</sup> Finding that creation of judicial remedies is a matter of state-wide concern, and is a function within the sole domain of state institutions,<sup>59</sup> the Court of Appeals retreated a little from its previous broad readings of the Express Powers Act.<sup>60</sup> Nevertheless, the retreat was not absolute—the court indicated that in limited circumstances it would uphold a municipality's power to create private

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55. 319 Md. 12, 570 A.2d 834 (1990). The decision answered questions of law certified from the United States District Court for the District of Maryland. See *Fowler v. McCrory*, 727 F. Supp. 228 (D. Md. 1989). The questions were certified pursuant to the Maryland Uniform Certification of Questions of Law Act, MD. CTS. & JUD. PROC. CODE ANN. §§ 12-601 to -609 (1989). See *infra* text accompanying note 71.

56. MONTGOMERY COUNTY, MD., CODE § 27-20(a) (1977). The ordinance provides, in pertinent part, that "[a]ny person who has been subjected to any act of discrimination prohibited under this division shall be deemed to have been denied a civil right and shall be entitled to sue for damages, injunction or other civil relief, including reasonable attorney's fees." *Id.*

57. See 319 Md. at 24, 570 A.2d at 840. The Home Rule Amendment provides in pertinent part:

From and after the adoption of a charter by the City of Baltimore, or any County of this State, as hereinbefore provided, the Mayor of Baltimore and City Council of the City of Baltimore or the County Council of said County, subject to the Constitution and Public General Laws of this State, shall have full power to enact local laws of said city or county . . . upon all matters covered by the express powers granted as above provided.

MD. CONST. art. XI-A, § 3. The Maryland legislature proposed article XI-A in 1914 and the voters ratified it on Nov. 2, 1915. See Act of Apr. 16, 1914, ch. 416, 1914 Md. Laws 661.

58. See *McCrory*, 319 Md. at 24, 570 A.2d at 840; MD. ANN. CODE art. 25A (1990).

59. See *McCrory*, 319 Md. at 24, 570 A.2d at 840.

60. See, e.g., *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 252 A.2d 242 (1969). In *Greenhalgh*, the Court of Appeals held that § 5(S) of the Express Powers Act authorized Montgomery County to enact a fair housing law prohibiting discriminatory practices in the sale, rental, or lending of money in relation to housing transactions. See *id.* at 160, 252 A.2d at 246. The court noted that "if the language of § 5(S) of Art. 25A were not to be construed as a broad grant of power to legislate on matters not specifically enumerated in Art. 25A," then the purposes of home rule would not be satisfied. Furthermore, "the language of that section clearly indicates that such a construction is sound." *Id.* at 160-61, 252 A.2d at 247.

causes of action.<sup>61</sup> Nor did the court completely curtail a county's power to legislate against employment discrimination; home rule counties<sup>62</sup> retain concurrent authority to fashion administrative remedies so long as they do not conflict with state law.<sup>63</sup>

1. *The Case.*—Robert Fowler was the manager of a McCrory Corporation store in Maryland. He alleged that McCrory harassed and eventually constructively discharged him in retaliation for his refusal to implement McCrory's discriminatory hiring practices.<sup>64</sup> Fowler sued McCrory in the Circuit Court for Montgomery County under 42 U.S.C. section 1981<sup>65</sup> and the common-law cause of action of abusive discharge.<sup>66</sup> McCrory removed the case to the United States District Court for the District of Maryland, and there Fowler filed two amended complaints. In the first, he deleted the abusive discharge count, added a cause of action under Montgomery County Code section 27-20(a), which creates a private cause of action to remedy a county anti-discrimination ordinance,<sup>67</sup> and asked for more than \$1.8 million in compensatory and punitive damages.<sup>68</sup> In the second amended complaint, he added a count under title VII of

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61. See *McCrory*, 319 Md. at 24, 570 A.2d at 840; see *infra* notes 90-95 and accompanying text.

62. A home rule county is a county that has adopted a charter form of government pursuant to the state constitution's Home Rule Amendment, MD. CONST. art. XI-A, §§ 1, 1A, and the Express Powers Act, MD. ANN. CODE art. 25A (1990). A county that adopts a home rule charter may achieve a significant degree of political self-determination, and the charter transfers to the home rule county the General Assembly's power to enact many types of county public local laws. See 319 Md. at 16, 570 A.2d at 835-36; see also *infra* note 74.

63. *McCrory*, 319 Md. at 21, 570 A.2d at 838; see also *infra* note 72 and accompanying text.

64. *McCrory*, 319 Md. at 14, 570 A.2d at 835. Fowler claimed that a McCrory manager told him not to hire any more black persons or persons under 35 years of age. *Id.*

65. *Id.* 42 U.S.C. § 1981 (1988) states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

*Id.*

66. *McCrory*, 319 Md. at 14, 570 A.2d at 835. The Court of Appeals first recognized a cause of action for the tort of abusive discharge in *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981). The court held that a cause of action exists when the employer's motivation for discharging an at-will employee "contravenes some clear mandate of public policy." *Id.* at 47, 432 A.2d at 473.

67. See MONTGOMERY COUNTY, MD., CODE § 27-20(a), quoted *supra* note 56.

68. *McCrory*, 319 Md. at 14-15, 570 A.2d at 835.

the Civil Rights Act of 1964.<sup>69</sup>

McCrorry moved to dismiss the first count, arguing that the county exceeded its delegated powers as a chartered home rule county by enacting the ordinance.<sup>70</sup> The district court certified to the Court of Appeals the following two questions:

(1) Did enactment of Section 27-20(a) of the Montgomery County Code, which creates a private cause of action for employment discrimination entitling a claimant to sue for damages, injunctive or other civil relief, exceed the authority delegated to chartered home rule counties by the Express Powers Act?

(2) If enactment of Section 27-20(a) did not exceed the authority delegated by the Express Powers Act, is it nevertheless invalid under Article XI-A, Section 3 of the Maryland Constitution because it conflicts with or is preempted by the laws and policies of the State as set forth in Article 49B of the Maryland Code?<sup>71</sup>

The Court of Appeals quickly resolved that article 49B did not preempt the county ordinance, and cited three recent decisions holding that when it enacted article 49B, the General Assembly did not intend to preempt local discrimination laws.<sup>72</sup> The court then considered whether section 27-20(a)'s enactment was outside the county's powers as a chartered home rule county, and determined that it was not a local law, and it therefore was not within the county's power to enact.<sup>73</sup>

2. *Legal Background.*—Under the Maryland constitution's Home Rule Amendment, Baltimore City and each Maryland county may adopt a charter form of local government.<sup>74</sup> The constitution

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69. *Id.* at 14, 570 A.2d at 835. Title VII of the Civil Rights Act of 1964 prohibits intentional employment discrimination, and provides limited remedies in the form of an injunction or other affirmative action. See 42 U.S.C. § 2000e-5(g) (1988).

70. *McCrorry*, 319 Md. at 14, 570 A.2d at 835.

71. *Id.* at 13, 570 A.2d at 834 (citation omitted).

72. See *id.* at 14 & n.2, 570 A.2d at 834 & n.2. The court cited *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 608, 561 A.2d 179, 181 (1989) (legislation enacting an antidiscriminatory policy does not preclude additional remedies against violation of the policy); *Maryland-Nat'l Capital Park & Planning Comm'n v. Crawford*, 307 Md. 1, 27, 511 A.2d 1079, 1092 (1986) (a state employee claiming race discrimination may assert a claim independent of article 49B); *National Asphalt Pavement Ass'n v. Prince George's County*, 292 Md. 75, 80, 437 A.2d 651, 653-54 (1981) (the General Assembly did not intend to preempt the field of employment discrimination when it enacted legislation prohibiting discriminatory employment practices).

73. See *McCrorry*, 319 Md. at 24, 570 A.2d at 840.

74. See MD. CONST. art. XI-A, §§ 1, 1A. The Home Rule Amendment's purpose was

also requires the General Assembly to grant express powers to counties adopting charters pursuant to the Home Rule Amendment.<sup>75</sup> The public general law defining a home rule county's powers is commonly known as the Express Powers Act.<sup>76</sup> The Act enumerates the counties' express powers,<sup>77</sup> as well as the following implied powers:

The foregoing or other enumeration of powers in this article shall not be held to limit the power of the county council, in addition thereto, to pass all ordinances, resolutions or bylaws, not inconsistent with the provisions of this article or the laws of the State, as may be proper in executing and enforcing any of the powers enumerated in this section or elsewhere in this article, as well as such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county.<sup>78</sup>

Once it adopts a charter, a home rule government has "full power to enact local laws" upon all matters covered by the express powers granted.<sup>79</sup> The Maryland constitution's only definition of a "local law" is that it is not "[a]ny law so drawn as to apply to two or more of the geographical subdivisions of this State."<sup>80</sup> Because this language is so broad, courts have significant latitude in determining

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to "share with the counties and Baltimore City, within well-defined limits, powers formerly reserved to the General Assembly so as to afford the subdivisions certain powers of self government." *Cheeks v. Cedlair Corp.*, 287 Md. 595, 597, 415 A.2d 255, 256 (1980).

75. See MD. CONST. art. XI-A, § 2.

76. See MD. ANN. CODE art. 25A (1990).

77. For example, the express powers include the power to enact local laws upon the following matters: protection of county property; building and control of county "hospitals, almshouses, pesthouses" and jails; drainage of swamp and lowlands; creation of election districts and precincts; maintenance of roads; assessment and collection of county taxes; enactment of local fish and game laws; and the enactment of planning and zoning laws. See *id.* § 5.

78. *Id.* § 5(S). In the leading case interpreting this clause, *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 252 A.2d 242 (1969), the court stated that "[t]he broadest grant of powers customarily is to home rule Counties . . . and cases holding that a delegation was restricted or narrow are concerned almost always with delegations to municipalities that do not enjoy home rule." *Id.* at 162, 252 A.2d at 247. See also *County Council for Montgomery County v. Investors Funding Corp.*, 270 Md. 403, 411-15, 312 A.2d 225, 230-32 (1973) (discussing the expansive nature of the legislative powers conferred by § 5(S), in relation to the county ordinance governing landlord-tenant relations).

79. See MD. CONST. art. XI-A § 3.

80. *Id.* § 4. The text defines a "geographical subdivision" as "the City of Baltimore or any of the counties of this State." *Id.*

whether or not a statute is a local law and within the county's power to enact, or a general law, and not within its enactment power.

The Court of Appeals has developed a nebulous test to determine whether a statute is a local or a general law. A law is local if "in subject matter and substance, [it] is confined in its operation to prescribed territorial limits and is equally applicable to all persons within [such limits]."<sup>81</sup> On the other hand, a general law is one "which deals with the general public welfare, a subject which is of significant interest not just to any one county, but rather to more than one geographical subdivision, or even to the entire state."<sup>82</sup> Although this local-or-general-law test provides courts with loose guidelines, the Court of Appeals in several older decisions concluded that a number of apparently local laws were general laws.<sup>83</sup> More recently, the court has tended to find that borderline statutes are local, rather than general, laws.<sup>84</sup> The court's decision in *McCrory* limits this trend.

3. *Analysis*.—In *McCrory*, the Court of Appeals applied the local-or-general-law test to section 27-20(a) of the Montgomery County Code, and concluded that it is not a local law.<sup>85</sup> Although it recognized that in establishing administrative remedies, local governments might address employment discrimination, the court held that creating a new judicial cause of action between private individu-

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81. *Steimel v. Board of Election Supervisors of Prince George's County*, 278 Md. 1, 357 A.2d 386, 388 (1976).

82. *Cole v. Secretary of State*, 249 Md. 425, 435, 240 A.2d 272, 278 (1968).

83. See *Norris v. Mayor of Baltimore*, 172 Md. 667, 192 A. 531 (1937) (overturning a Baltimore City ordinance directing the purchase and use of voting machines); *Dasch v. Jackson*, 170 Md. 251, 183 A. 534 (1936) (overturning a Baltimore City ordinance providing for the licensing and regulation of paperhangers); *Gaither v. Jackson*, 147 Md. 655, 128 A. 769 (1925) (overturning a Baltimore City ordinance licensing auctioneers); *Bradshaw v. Lankford*, 73 Md. 428, 21 A. 66 (1891) (overturning a Somerset County ordinance prohibiting oyster dredging in county waters). Although "the immediate objective sought to be achieved was local in character" these laws were general because they "indirectly affected matters of significant interest to the entire state: i.e., regulation of elections, control of natural resources, and protection of state revenues derived from licenses." *Cole*, 249 Md. at 435, 240 A.2d at 278.

84. See *Mayor of Forest Heights v. Frank*, 291 Md. 331, 435 A.2d 425 (1981) (upholding a county ordinance licensing fortune tellers); *Steimel*, 278 Md. 1, 357 A.2d 386 (1976) (upholding a county ordinance requiring Prince George's County businesses to close on Sunday); *Mayor of Baltimore v. Sitnick*, 254 Md. 303, 255 A.2d 376 (1969) (upholding a Baltimore City ordinance establishing minimum wage standards); *Cole*, 249 Md. 425, 240 A.2d 272 (1968) (upholding statutes transferring civil and criminal jurisdiction from state-appointed judicial officers to the People's Court of Cecil County).

85. See *McCrory*, 319 Md. at 24, 570 A.2d at 840.

als encroached upon the province of state agencies.<sup>86</sup>

The court followed the general rule "that a municipal corporation cannot create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves."<sup>87</sup> This rule's justification lies in the desire for consistency and predictability in private legal relationships. The court in *McCrory* suggested that allowing municipalities to create private causes of action would open the door for them to change well-established legal doctrines, such as those relating to contributory negligence and parol evidence.<sup>88</sup> If home rule counties enacted their own rules relating to these doctrines, the state law eventually would become inoperative; therefore, home rule ordinances must have "uniform application in state courts."<sup>89</sup>

But the Court of Appeals did not completely preclude home rule counties from authorizing a private cause of action as a remedy. When the ordinances address "subject matters of a peculiarly local nature," the court indicated that these statutes are local law and, hence, within a county's power to enact.<sup>90</sup> The court noted that courts in Oregon<sup>91</sup> and Colorado,<sup>92</sup> as well as the Maryland Attorney General,<sup>93</sup> have recognized that municipalities may in limited

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86. *See id.* at 20, 570 A.2d at 838.

87. 6 McQUILLIN, MUNICIPAL CORPORATIONS § 22.01 (1988) (quoted in *McCrory*, 319 Md. at 23, 570 A.2d at 839). The court also cited a number of cases from jurisdictions throughout the United States that invalidated local government laws creating private rights of action. *See, e.g.*, *Bain v. Ft. Smith Light & Traction Co.*, 116 Ark. 125, 133-34, 172 S.W. 843, 845-46 (1915) (violation of an ordinance that created liability against street railway companies did not give rise to liability where no state statute conferred upon municipal corporations the power to pass such an ordinance); *Tynes v. Gogos*, 144 A.2d 412, 417 (D.C. 1958) (antidiscrimination ordinances do not give rise to a civil action for damages); *City of Joplin v. Wheeler*, 173 Mo. App. 590, 604, 158 S.W. 924, 928 (1913) (an ordinance regulating a water company's performance cannot create new duties); *Orr v. Baltimore & Ohio R.R. Co.*, 168 App. Div. 548, 550, 153 N.Y.S. 920, 921 (1915) (an ordinance stating that storing a certain quantity of nitrate soda without a license should constitute a nuisance was ineffective to constitute such storage a nuisance).

88. *See* 319 Md. at 21, 570 A.2d at 838.

89. *Id.*

90. *See id.* at 24, 570 A.2d at 840.

91. *See Papen v. Karpow*, 56 Or. App. 673, 677, 643 P.2d 375, 377-78 (1982) (although a city snow removal ordinance did not create a private cause of action, the city may, by express provision, give third parties a right of action against the abutting land owner).

92. *See Bittle v. Brunetti*, 750 P.2d 49 (Colo. 1988) (a snow removal ordinance did not create a duty to pedestrians, but a municipality could expressly create a right of action against abutting land owners).

93. *See* 73 Op. Att'y Gen. 101 (1988). Montgomery County's county attorney requested the Attorney General's opinion on the validity of Montgomery County Code

circumstances create a right of action.<sup>94</sup> According to the court, snow removal and towing ordinances address exclusively local matters, and aid the counties in carrying out their express legal duties; therefore, they are valid local laws.<sup>95</sup>

In addition, remedies provided in snow removal and towing ordinances are extremely limited, unlike section 27-20's remedy, which could include unlimited monetary damages.<sup>96</sup> The court in *McCrory* seemed concerned about this aspect of the ordinance, especially in light of Fowler's request for more than \$1.8 million in damages.<sup>97</sup> The court was perhaps also concerned that "forum shopping" would result if it permitted counties to create new judicial remedies above and beyond those provided by state law.<sup>98</sup>

4. *Conclusion.*—The *McCrory* decision limits victims of employment discrimination to state and federal judicial remedies and local administrative remedies. In so doing, the court has assured uniform application of law by denying counties the ability to create private causes of action for unlimited damages. Uniformity is important in

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§ 30c-9(a), which creates a private right of action for a vehicle owner whose vehicle is improperly towed or damaged:

Any trespass towing service, and any private property owner who authorizes, expressly or under a standing authorization, the towing of a vehicle from private property, are both liable for . . . (3) any damages to a towed vehicle incurred during the tow or storage and caused by a lack of reasonable care by the towing service, the property owner or an agent of either.

MONTGOMERY COUNTY, MD., CODE § 30c-9(a). The ordinance specifies that damages will be "3 times the amount of any towing, release or storage fees charged." *Id.* § 30C-9(e). The Attorney General concluded that "Montgomery County has a legitimate public policy objective in ensuring that private vehicles are not improperly towed" and that the private right of action created by this ordinance did not overstep the county's police power conferred by the Express Powers Act. See 73 Op. Att'y Gen. 101, 106 (1988).

94. See *McCrory*, 319 Md. at 23-24, 570 A.2d at 839-40.

95. See *id.* at 24, 570 A.2d at 840.

96. See MONTGOMERY COUNTY, MD., CODE § 27-20(a) (1977), quoted *supra* note 56.

97. See *McCrory*, 319 Md. at 21-22, 570 A.2d at 838-39. The court noted that in *County Council for Montgomery County v. Investors Funding Corp.*, 270 Md. 403, 312 A.2d 225 (1973), it upheld a chartered county's authority to enact local laws to revise the common law and provide enforcement remedies. In that case, however, the remedial powers "to terminate leases, order repairs and award limited damages" were limited compared to those in issue here. See 319 Md. at 21-22, 570 A.2d at 838-39.

98. The court hinted that forum shopping was a concern when it noted that certain matters are "of significant interest to the entire state, calling for *uniform application* in state courts." *McCrory*, 319 Md. at 21, 570 A.2d at 838 (emphasis added).

employment discrimination law because it encompasses issues of significant interest to the entire state.

DAVID TIGER  
KAREN L. BENEDETTI



## IX. LEGISLATION

### A. *The Maryland International Commercial Arbitration Act*

On May 2, 1990, Governor William Donald Schaefer signed into law the Maryland International Commercial Arbitration Act (MICA).<sup>1</sup> Initially drafted and endorsed by the Maryland State Bar Association's (MSBA) International Commercial Law Section,<sup>2</sup> the Act seeks to make Maryland more attractive for international commerce by adopting an arbitration model that defers to federal process and enforcement methods.<sup>3</sup> Prior to MICA's enactment, it was uncertain whether international arbitrations could be heard in Maryland. Section 3-202 of the Maryland Courts and Judicial Proceedings Article<sup>4</sup> outlines jurisdiction for domestic arbitrations, but neither confirms nor denies jurisdiction for international arbitration, merely stating that: "An agreement providing for arbitration under the law of the State confers jurisdiction on a court to enforce the agreement and enter judgment on an arbitration award."<sup>5</sup> By clarifying and simplifying Maryland law on international commercial arbitration, the Act provides international businesses an element of certainty and ease, giving them incentive to do business in Maryland.

In a memorandum to the legislature outlining the Act's purposes,<sup>6</sup> the MSBA International Commercial Law Section maintained that the applicability of a single body of law (federal law) to the process and enforcement of international arbitrations in Maryland would improve the state's business climate by promoting certainty and uniformity.<sup>7</sup> Maryland's reputation as an international commercial and legal center would be boosted if its law encouraged swift and uncomplicated dispute resolution.<sup>8</sup> Other organizations

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1. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2B-01 to -09 (Supp. 1990); see Gorman, *Arbitration Act Makes Maryland Attractive for Settling Disputes*, The Daily Record, June 6, 1990, at 22, col. 3. The Act took effect July 1, 1990.

2. See Memorandum from the Maryland State Bar Association Section of International Commercial Law to the Maryland House Judiciary Committee (Feb. 1990) [hereinafter MSBA Memorandum] (copy on file with *Maryland Law Review*).

3. See MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2B-02 to -03; MSBA Memorandum, *supra* note 2; Gorman, *supra* note 1.

4. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to -234 (1989).

5. *Id.* § 3-202.

6. See MSBA Memorandum, *supra* note 2.

7. See *id.* at 1.

8. *Id.* at 2.

supported the MSBA-sponsored proposal and now anticipate a boon to the state's economy and business climate.<sup>9</sup> The Act's explicit purpose is to promote international commercial arbitration, enforce arbitration agreements, facilitate dispute resolution, and promote uniformity of law.<sup>10</sup>

In choosing federal law<sup>11</sup> as MICA's principal model, Maryland follows a path different from other states that have adopted international commercial arbitration legislation.<sup>12</sup> Other states have based their arbitration laws on models such as the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules,<sup>13</sup> the UNCITRAL Model Law on International Commercial Arbitration,<sup>14</sup> or expanded versions of their domestic arbitration provisions.<sup>15</sup> By doing so, these states may cause international businesses unnecessary confusion and uncertainty.<sup>16</sup> Maryland avoided this problem by enacting MICA. Though tangible benefits will be difficult to detect in the short term, Maryland chose the most prudent course.

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9. The Maryland Chamber of Commerce, Maryland Economic Growth Associates, an economic development organization comprised of the chief executive officers of prominent Maryland corporations, and the Maryland Department of Economic & Employment Development all expressed support for the Act to the House Judiciary Committee or the Senate Judicial Proceedings Committee. See *International Commercial Arbitration: Hearings on H.B. 528 Before the House Committee on the Judiciary* (Feb. 13, 1990) [hereinafter *Hearings*] (testimony of Peggy Chaplin, Esq., for the Maryland Chamber of Commerce; testimony of Donald P. Hutchinson, President of the Maryland Economic Growth Associates) (copies on file with *Maryland Law Review*); Letter from J. Randall Evans, Secretary of the Maryland Department of Economic and Employment Development to Hon. Daniel Long, Chairman of the House Judiciary Committee (Feb. 12, 1990); Letter from J. Randall Evans to Hon. Walter Baker, Chairman of the Senate Judicial Proceedings Committee (Mar. 29, 1990).

10. See MD. CTS. & JUD. PROC. CODE ANN. § 3-2B-02 (Supp. 1990).

11. 9 U.S.C. §§ 201-208 (1988). See *infra* notes 45-49 and accompanying text.

12. See *Hearings*, *supra* note 9, at 3 (testimony of Peggy Chaplin, Esq., for the Maryland Chamber of Commerce).

13. See *Report of the United National Commission on International Trade Law on the Work of its Ninth Session, April 12-May 7, 1976*, 31 U.N. GAOR Supp. (No. 17), at 57, U.N. Doc A/31/17, Annex II (1976), UNCITRAL ARBITRATION RULES, U.N. Sales No. E.77.V.6 (1976).

14. See *Report of the United National Commission on International Trade Law on the Work of its Eighteenth Session, June 3-21, 1985*, 40 U.N. GAOR Supp. (No. 17), at 81-93, U.N. Doc A/40/17, Annex I (1985).

15. See *infra* notes 58-63 and accompanying text.

16. See, e.g., Gorman, *supra* note 1 (Maryland's adoption of federal law in the process and enforcement of international commercial arbitration reduces the possibility of confusion and uncertainty for international businesses).

1. *Key Provisions of MICA*.<sup>17</sup>—Several states have adopted legislation to attract international commercial arbitration, but Maryland is the first expressly to adopt federal law for its process and enforcement. MICA, as codified at section 3-2B-03 of the Courts and Judicial Proceedings Article, reads: "In all matters relating to the process and enforcement of international commercial arbitration and awards, the laws of Maryland shall be the arbitration statutes and laws of the United States."<sup>18</sup> Maryland substantive law remains available to resolve disputes concerning contract interpretation or performance.<sup>19</sup>

Although MICA defers to federal law for rules governing international arbitration,<sup>20</sup> it departs from federal law in the provisions concerning posting of security, the standard of review applicable to security orders, and making determinations without a jury. First, section 3-2B-06 allows Maryland arbitral tribunals<sup>21</sup> in an international commercial arbitration matter to order either party to post pre-award security if there is good cause to require security.<sup>22</sup> Though not in the federal statute, this provision does not conflict with the federal statute; rather, the provision enlarges the parties' rights in accordance with the UNCITRAL Model Law.<sup>23</sup> Second, the Maryland statute establishes abuse of discretion as the proper standard of review for court challenges to a pre-award security order.<sup>24</sup> Finally, section 3-2B-07 directs the court to make any necessary determinations without a jury.<sup>25</sup> Although this provision is contrary to federal law, it conforms to the existing Maryland Uniform Arbitration Act,<sup>26</sup> and it is consistent with the process in many foreign countries.<sup>27</sup> Thus, the Maryland statute incorporates federal law on international arbitration, but makes minor changes that

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17. For a section by section analysis of the Maryland International Commercial Arbitration Act, see Gorman, *supra* note 1.

18. MD. CTS. & JUD. PROC. CODE ANN. § 3-2B-03 (Supp. 1990).

19. See MSBA Memorandum, *supra* note 2, at 2-3; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 186-188 (1971) (the law of the state chosen by the parties governs most contract issues).

20. See *infra* notes 45-49 and accompanying text.

21. "Arbitral tribunal" refers to either a sole arbitrator or a panel of arbitrators. See MD. CTS. & JUD. PROC. CODE ANN. § 3-2B-01(C) (Supp. 1990).

22. See *id.* § 3-2B-06.

23. See Articles 9 and 17 of UNCITRAL Model Law on International Commercial Arbitration; see *supra* note 14.

24. See MD. CTS. & JUD. PROC. CODE ANN. § 3-2B-06(2) (Supp. 1990).

25. See *id.* § 3-2B-07(b).

26. See *id.* § 3-204 (1989) ("The court shall make any determination provided for in this subtitle without a jury.").

27. See Gorman, *supra* note 1.

provide parties with more rights, in accord with the UNCITRAL Model Law and clearly established Maryland policy.

2. *Development of International Arbitration.*—During the past four decades, international arbitration has become the favored means of dispute resolution in international commercial circles.<sup>28</sup> Arbitration is viewed as more flexible, more efficient, and quicker than litigation.<sup>29</sup>

The comparative advantages and disadvantages of arbitration as opposed to litigation have been well rehearsed. Arbitration is a *private* process, an advantage in the eyes of those who do not want details of their quarrels (accompanied almost inevitably by attacks on their competence or good faith) to be disclosed in open court, with the possibility of further publication elsewhere. Arbitration also offers the parties the opportunity to choose their own judge, in a way which is not usually possible in court proceedings. One or more arbitrators may be chosen for their special skill and expertise in commercial law, civil engineering or some other relevant discipline. An experienced arbitral tribunal of this kind should be able to grasp quickly the salient issues of fact or law in dispute and so save the parties both time and money, as well as offering them the prospect of a sensible award.<sup>30</sup>

Many of those involved in international commercial arbitration anticipate substantial increases in the number of disputes submitted to arbitration.<sup>31</sup> In response to this anticipated rise, many nations and international groups have developed laws and procedures for settling international commercial disputes.<sup>32</sup>

The most important work in this field originated in the United Nations (UN). In 1958, the UN's New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New

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28. See Thieffry, *Europe 1992: Arbitration Expected to Increase*, Nat'l L.J., Mar. 19, 1990, at 21, col. 1.

29. See *id.*

30. A. REDFERN & M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 17 (1986) (emphasis in original) (footnote omitted); see also A. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, 1 (1981) (rules governing international commercial arbitration are key to its effectiveness); Note, *International Commercial Arbitration in the United States: Considering Whether to Adopt UNCITRAL's Model Law*, 10 MICH. J. INT'L L. 912, 924 (1989) (listing advantages of arbitration over litigation).

31. See Thieffry, *supra* note 28, at 21.

32. *Id.* at 23.

York Convention)<sup>33</sup> was signed, simplifying enforcement of arbitral awards abroad,<sup>34</sup> and thus enhancing the advantages of international arbitration over international litigation.<sup>35</sup> In 1970, Congress adopted the New York Convention in chapter 2 of the Federal Arbitration Act.<sup>36</sup> In addition to the United States, eighty nations have adopted the New York Convention.<sup>37</sup>

In 1966, the UN General Assembly established by resolution the United Nations Commission on International Trade Law (UNCITRAL), in response to a proposal that the United Nations assume a stronger role in reducing legal obstacles to international trade.<sup>38</sup> During the mid 1970s, UNCITRAL prepared a set of arbitration rules designed for "optional use in ad hoc arbitration relating to international trade."<sup>39</sup> These rules were adopted as the UNCITRAL Arbitration Rules at its ninth session in 1976.<sup>40</sup> By June 1985, UNCITRAL had developed the UNCITRAL Model Law on

33. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1968, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

34. Two ways in which the New York Convention simplified arbitral awards enforcement are: first, the arbitration law of the country where the arbitration took place does not have to be taken into account if the parties made an agreement regarding the arbitral tribunal's composition or the arbitration procedure; and second, the burden of proof is shifted from the party seeking enforcement to the party against whom enforcement is sought (all the party seeking enforcement need do is supply the arbitration agreement and award). See A. VAN DEN BERG, *supra* note 30, at 8-10.

35. See Hoellering, *International Commercial Arbitration: A Peaceful Method of Dispute Settlement*, 40 ARB. J. 19, 20 (1985).

36. See 9 U.S.C. §§ 201-208 (1988). This chapter took effect on December 29, 1970. *Id.*

37. The New York Convention's eighty-three signatories are Algeria, Antigua and Barbuda, Argentina, Australia, Austria, Bahrain, Belgium, Benin, Botswana, Bulgaria, Burkina-Faso, Byelorussian Soviet Socialist Republic, Cameroon, Canada, Central African Republic, Chile, China, Columbia, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Djibouti, Dominica, Ecuador, Egypt, Federal Republic of Germany, Finland, France, German Democratic Republic, Ghana, Greece, Guatemala, Haiti, Holy See, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kampuchea, Kenya, Korea, Kuwait, Lesotho, Luxembourg, Madagascar, Malaysia, Mexico, Monaco, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Peru, Philippines, Poland, Romania, San Marino, Singapore, South Africa, Spain, Sri Lanka (Ceylon), Sweden, Switzerland, Syrian Arab Republic, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, and Yugoslavia. See U.S. DEP'T OF STATE, *TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1990*, at 282 (1990).

38. See Fleischhauer, *UNCITRAL Model Law on International Commercial Arbitration*, 41 ARB. J. 17, 17 (1986).

39. UNCITRAL: THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, at 27-28, U.N. Sales No. E.86.V.8 (1986) [hereinafter UNCITRAL].

40. See *supra* note 13.

International Commercial Arbitration<sup>41</sup> to treat problems arising from dissimilar national laws, such as the restriction of "disputes which can be submitted to arbitration, the selection and appointment of arbitrators, as well as the operation of the arbitration proceedings."<sup>42</sup> On December 11, 1985, the UN General Assembly recommended that nations seriously consider adopting the UNCITRAL Model Law.<sup>43</sup>

As a consequence of these developments and the increased attention paid to international commercial matters, nations compete as possible arbitration venues, including most notably France, Sweden, Switzerland, the United Kingdom, and the United States.<sup>44</sup>

3. *United States Law*.—United States arbitration law is contained in the Federal Arbitration Act,<sup>45</sup> which incorporates the New York Convention. Other conventions or treaties to which the United States is a party also constitute federal law.<sup>46</sup> The United States has signed, but not ratified, the Inter-American Convention on International Commercial Arbitration (the Panama Convention).<sup>47</sup> Created by the Organization of American States in 1975,

41. See *supra* note 14.

42. McNerney & Esplugues, *International Commercial Arbitration: The UNCITRAL Model Law*, 9 B.C. INT'L & COMP. L. REV. 47, 47 (1986).

43. See A. Broches, *Commentary on the UNCITRAL Model Law*, in 2 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 4 (P. Sanders ed. 1984). The Washington Foreign Law Society's Committee to Study the United Nations Model Law on International Commercial Arbitration recommended that Congress not adopt the Model Law as a whole, but instead append particular articles to the Federal Arbitration Act, excluding the others. The Committee maintained that "[e]xisting federal arbitration law is strongly supportive in its enforcement of international agreements and recognition and enforcement of foreign awards." *Report to the Washington Foreign Law Society on the UNCITRAL Model Law on International Commercial Arbitration*, 3 OHIO ST. J. DISPUTE RES. 303, 311-16 (1988); see also Note, *supra* note 30, at 912 (discussing the history of the UNCITRAL Model Law).

44. Hoellering, *supra* note 35, at 21.

45. 9 U.S.C. §§ 201-208 (1988).

46. See U.S. CONST. art. III, § 2, cl. 1 (extending federal judicial power to cases arising under United States treaties).

47. OAS/Ser.A/20 (SEPF), *opened for signature* Jan. 30, 1975, *reprinted in* 14 INT'L LEGAL MATERIALS [I.L.M.] 336 (1975).

In 1987, it appeared that the United States was on the verge of ratifying the Panama Convention. See Comment, *Seeking Its Place in the Sun: Florida's Emerging Role in International Commercial Arbitration*, 19 U. MIAMI INTER-AM. L. REV. 363, 364 & n.5 (1987-88). If the United States adopts the Panama Convention, it will be codified as chapter 3 of the Federal Arbitration Act. See *id.* at 386-87 n.158.

The Panama Convention's 17 signatories as of 1986 were Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, United States, Uruguay, and Venezuela. See AMERICAN ARBITRATION ASS'N, THE INTERNATIONAL ARBITRATION KIT: A COMPILATION

the Panama Convention, much like the New York Convention, promotes arbitral awards enforcement between citizens of member states.<sup>48</sup> The United States has also entered into numerous bilateral commercial treaties that provide for reciprocal enforcement of arbitration agreements and awards.<sup>49</sup>

United States efforts to facilitate international arbitration have been generally successful. Most commentators believe that the United States provides a favorable climate for the growth of international arbitration, "largely due to legislation favoring arbitration, and a judiciary supportive of arbitration."<sup>50</sup>

Just as rival nations compete internationally, competition among the states has emerged from their efforts to secure a share of international arbitrations and an anticipated greater amount of international trade. In addition to Maryland, California,<sup>51</sup> Connecti-

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OF BASIC AND FREQUENTLY REQUESTED DOCUMENTS 23 (L. Brown ed. 1986) [hereinafter INTERNATIONAL ARBITRATION KIT]. Of these, only nine have ratified the Convention: Chile, Costa Rica, El Salvador, Honduras, Mexico, Panama, Paraguay, Uruguay, and Venezuela. *Id.* The treaty was first submitted to the United States Senate on June 18, 1981. *Id.* at 19.

48. See THE INTERNATIONAL ARBITRATION KIT, *supra* note 47, at 19.

49. As of 1990, the United States had entered 18 bilateral commercial treaties: Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155 (Jan. 21, 1950); Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057 (Aug. 31, 1951); Israel, 5 U.S.T. 550, T.I.A.S. No. 2948 (Aug. 23, 1951); Italy, 12 U.S.T. 131, T.I.A.S. No. 4685 (Sept. 26, 1951); Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797 (Oct. 1, 1951); Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (Apr. 2, 1953); Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593 (Oct. 29, 1954); Iran, 8 U.S.T. 899, T.I.A.S. No. 3853 (Aug. 15, 1955); Nicaragua, 9 U.S.T. 499, T.I.A.S. No. 4024 (Jan. 21, 1956); Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942 (May 26, 1956); Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947 (Nov. 28, 1956); Pakistan, 12 U.S.T. 110, T.I.A.S. No. 4683 (Nov. 12, 1959); France, 11 U.S.T. 2398, T.I.A.S. No. 4625 (Nov. 25, 1959); Belgium, 14 U.S.T. 1284, T.I.A.S. No. 5432 (Feb. 21, 1961); Vietnam, 12 U.S.T. 1703, T.I.A.S. No. 4890 (Apr. 3, 1961); Luxembourg, 14 U.S.T. 251, T.I.A.S. No. 5306 (Feb. 23, 1967); Togo, 18 U.S.T. 1, T.I.A.S. No. 6193 (Feb. 8, 1966); Thailand, 19 U.S.T. 5843, T.I.A.S. No. 6540 (May 29, 1966). See INTERNATIONAL ARBITRATION KIT, *supra* note 47, at 53.

50. Note, *supra* note 30, at 922-23. The author offered several Supreme Court decisions enforcing agreements to arbitrate despite either federal law or public policy favoring litigation. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (holding that claims involving anti-trust issues, although nonarbitrable when domestic, are arbitrable if the contract is international); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974) (securities claims, although nonarbitrable when domestic, are arbitrable if the contract is international). See also Hoellering, *supra* note 35, at 23 (citing *Scherk* and *Mitsubishi*).

51. See California International Arbitration and Conciliation Act, CAL. CIV. PROC. CODE §§ 1297.11 to .342 (West Supp. 1990).

cut,<sup>52</sup> Florida,<sup>53</sup> Georgia,<sup>54</sup> Hawaii,<sup>55</sup> and Texas<sup>56</sup> have adopted international arbitration legislation.<sup>57</sup> Unlike the nations competing at the international level, these states take markedly dissimilar approaches.

4. *MICA and the Other Models.*—Although six states have international arbitration legislation, no state other than Maryland has expressly adopted federal law. Florida, the first state to adopt international arbitration legislation, consulted the arbitration rules of various organizations and jurisdictions, most notably the UNCITRAL Arbitration Rules and Federal Arbitration Act,<sup>58</sup> before creating a largely homespun international arbitration act.<sup>59</sup> California has adopted a modified version of UNCITRAL's Arbitration

52. See UNCITRAL Model Law on International Commercial Arbitration, *reprinted in* CONN. GEN. STAT. ANN. app. at 30 (West Supp. 1990).

53. See Florida International Arbitration Act, FLA. STAT. §§ 684.01 to .35 (1989).

54. See Georgia Arbitration Code (International Transactions), GA. CODE ANN. §§ 9-9-30 to -43 (Supp. 1990).

55. Hawaii International Arbitration, Mediation, and Conciliation Act, HAW. REV. STAT. §§ 658D-1 to -9 (1988).

56. Texas International Arbitration Act, TEX. REV. CIV. STAT. ANN. arts. 249-1 to -43 (Vernon Supp. 1990).

57. One commentator asserted that New York legislation is broad enough to encompass international parties although it was not specifically enacted as an international commercial arbitration statute. See Comment, *supra* note 47, at 375-76 n.66. Sections 5-1401 and 5-1402 of New York's General Obligations article recognize "New York choice-of-law and choice-of-forum clauses in contracts in excess of \$250,000 in which neither the parties nor the transaction have any connection to New York." *Id.* (citing N.Y. GEN. OBLIG. LAW §§ 5-1401 to -1402 (McKinney 1989)).

58. The task force drafting Florida's statute also reviewed the following sources: the arbitration rules of the American Arbitration Association and the International Chamber of Commerce; the current or then-proposed laws of New York, California, France, the United Kingdom, and Hong Kong; the existing Florida Arbitration Code; the Inter-American Convention on International Commercial Arbitration; and a draft of the UNCITRAL Model Law on International Commercial Arbitration. See Loumiet, O'Naghten & Swan, *Proposed Florida International Arbitration Act*, 16 U. MIAMI INTER-AM. L. REV. 591, 594 n.2 (1985).

The non-state law sources listed above can be found as follows: AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES (1982), *reprinted in* INTERNATIONAL ARBITRATION KIT, *supra* note 47, at 191-204; INT'L CHAMBER OF COMMERCE, ICC RULES OF CONCILIATION AND ARBITRATION, *reprinted in*, INT'L CHAMBER OF COMMERCE, ICC ARBITRATION: THE INTERNATIONAL SOLUTION TO INTERNATIONAL BUSINESS DISPUTES, at 38-43 (1977); France, CODE DE PROCÉDURE CIVILE art. 1442-1507 (Codes Dalloz 1990); United Kingdom, Arbitration Act of 1950, Arbitration Act of 1975, Arbitration Act of 1979; Hong Kong, Arbitration Ordinance, 1982 (ch. 341); Panama Convention, Inter-American Convention on International Commercial Arbitration, OAS/Ser.A/20 (SEPF) *opened for signature* Jan. 30, 1975, *reprinted in* 14 I.L.M. 336 (1975); UNCITRAL draft, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, UNCITRAL'S PROJECT FOR A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1-12 (P. Sanders ed. 1984).

59. See Florida International Arbitration Act, FLA. STAT. § 684.01 to .35 (1989).



Rules.<sup>60</sup> Connecticut's international arbitration act follows the UNCITRAL Model Law on International Commercial Arbitration,<sup>61</sup> as does, to a lesser degree, Texas' international arbitration statute.<sup>62</sup> Georgia's international statute supplements its domestic arbitration code by selective adoption of UNCITRAL language. Finally, Hawaii's approach is unique. Instead of providing detailed rules for international arbitrations, Hawaii channels all matters to the Hawaii Center for International Commercial Dispute Resolution.<sup>63</sup> Maryland is thus alone in deferring to federal law.<sup>64</sup>

The question remains whether Maryland has adopted the best approach. Only Hawaii's statute approaches the Maryland statute's textual simplicity. Every other state statute consists of lengthy, detailed rules for arbitration proceedings. How this will affect prospective international business officials cannot be accurately measured. But for the average layperson concerned with arbitration, complicated rules are likely to produce confusion and apprehension. Good arbitration rules should have the opposite effect. Because business executives already must be familiar with federal law generally, requiring them to learn complex state rules seems unnecessarily burdensome.

Several Florida commentators have cited potential gaps in arbitrability coverage, and concluded that federal law is inadequate.<sup>65</sup> Nations that are not signatories of either the New York or Panama Conventions, or are not engaged in business with a United States citizen, are not eligible for arbitration under federal law. An example often cited is the following: A dispute between a Brazilian and an Argentine arising from a contract to ship goods from Peru to England would not be arbitrable under the Federal Arbitration Act.<sup>66</sup> With respect to attracting international arbitrations unre-

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60. See Wright, *California's International Commercial Arbitration Act: New Procedures for the Arbitration and Conciliation of International Commercial Disputes*, 17 INT'L BUS. LAW. 45, 45 (1989).

61. See UNCITRAL Model Law on International Commercial Arbitration, 1989 CONN. PUB. ACTS 89-179, reprinted in CONN. GEN. STAT. ANN. app. at 30 (West Supp. 1990).

62. See Hoyt, *Proposed Texas International Arbitration Act*, 52 TEX. B.J. 148 (1989).

63. The Hawaii Center for International Commercial Dispute Resolution is a project comprising the Hawaii State Bar Association, the University of Hawaii Program on Conflict Resolution, the University of Hawaii William S. Richardson School of Law, the Honolulu office of the American Arbitration Association and the Hawaii state judiciary. See Comment, *supra* note 47, at 375 n.66.

64. See *Hearings*, *supra* note 12 and accompanying text.

65. See Comment, *supra* note 47, at 387; see also Loumiet, O'Naghten & Swan, *supra* note 58, at 619-20 (state law should fill gaps in federal law).

66. See Comment, *supra* note 47, at 387.

lated to the jurisdiction, the federal law is not as effective as statutes that offer greater coverage. But failure to attract the international arbitration of matters unrelated to the jurisdiction's international trade does not detract from the statutes' primary goal, which is to enhance prospects for international trade by fostering a better legal and business climate. It would seem more important to appeal to a potential trading partner than to attract a forum-shopper who is unlikely to engage in future trade in the state.

States that have been influenced by the UNCITRAL Model Law—Connecticut, Texas, and, arguably, Georgia—may have arbitration statutes containing rules that are more familiar than United States federal law to foreign parties. Because the UNCITRAL Model Law received the UN General Assembly's recommendation, international parties probably will have encountered it before. These states, however, take the risk that their arbitration laws will conflict with federal law, in which case federal law will likely prevail.<sup>67</sup> These states risk confusing and alienating foreign business customers, and burdening them with researching both federal and state law, and anticipating conflicts. Similar problems exist with California's and Hawaii's statutes. These state statutes, though perhaps more initially recognizable and favorable to international parties, do not offer the certainty that Maryland law provides by its adherence to federal law.

5. *Effects of MICA*—This legislation's economic effects are difficult to gauge. The simplification and streamlining of legal dispute resolution should improve the state's international business climate. The Act will do nothing to hinder international trade. Favorable arbitration statutes are, however, only one component of an attractive business climate.

A state's reputation for being on the cutting edge of international commerce may also be a plus. International arbitration increased in California after it enacted its arbitration statute.<sup>68</sup> Time will tell whether Maryland's act increases the number of arbitra-

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67. See Hoellering, *supra* note 35, at 23. Hoellering asserted that a Supreme Court decision holding that the Federal Arbitration Act preempts state law when interstate commerce is involved (see *Southland Corp. v. Keating*, 465 U.S. 1 (1984)), would also preempt state law for international commerce. See also Comment, *Preemption of State Law Under the Federal Arbitration Act*, 15 U. BALT. L. REV. 129, 144-46 (1985) (discussing *Southland's* effect on arbitration in Maryland).

68. See Hoyt, *supra* note 62, at 148.

tions<sup>69</sup> held in Maryland, and benefits the business community at large.

6. *Conclusion.*—When it enacted the Maryland International Commercial Arbitration Act, the Maryland legislature ensured that in Maryland only one body of law would govern international commercial arbitration. Significant departures from this general rule are the provisions for security posting, standard of review, and determinations of fact by the court, which accord with either the UNCITRAL Model Law or established Maryland policy. MICA will have the practical effect of harmonizing Maryland law with federal law.<sup>70</sup> Because of this uniformity, Maryland international arbitration will be easier for foreign parties to understand, reducing confusion and promoting certainty.

Considering the alternatives, the Maryland legislature took the most prudent course in responding to the need for international arbitration legislation. Adopting a clearly syncaphonous position with regard to federal law gives Maryland flexibility as federal law changes. Maryland will avoid the confusion and uncertainty created when state and federal law conflict, where “the dicey atmosphere of such a legal no-man’s land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.”<sup>71</sup> The legislature is to be commended for making the state a leader in this area.

### *B. The Drug Enforcement Act of 1990*

1. *Introduction.*—The Drug Enforcement Act of 1990<sup>72</sup> reflects the Maryland Legislature’s determination to strengthen drug enforcement efforts with strict, innovative new laws. The Act’s most important provisions restrict a judge’s ability to grant drug offend-

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69. An increase in the number of international arbitration hearings in Maryland is unlikely to seriously affect the case load of Maryland circuit courts. *See* Letter from Chief Judge Robert Murphy, Maryland Court of Appeals, to Geoffrey Tobias, Chair of the International Commercial Law Section of the Maryland State Bar Ass’n (Dec. 22, 1989) (copy on file with *Maryland Law Review*).

70. *See* MD. CTS. & JUD. PROC. CODE ANN. § 3-2B-03 (Supp. 1990) (“This subtitle shall be interpreted and construed as to promote uniformity in the law of international commercial arbitration in the United States.”).

71. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 (1974) (stating the likely effects of a refusal of one country’s courts to honor the decisions of foreign courts).

72. The Drug Enforcement Act of 1990, ch. 410, 1990 Md. Laws 1666 (effective Jan. 1, 1991).

ers probation before judgment, and impose licensing sanctions against convicted offenders who hold occupational and professional licenses.<sup>73</sup> The Act seeks to deter the demand for drugs and weaken the "demand side" of Maryland's illegal drug market by raising the legal consequences of drug use.<sup>74</sup>

Most innovative legislation raises new constitutional issues, and the Drug Enforcement Act of 1990 is no exception. In particular, the Act requires courts to make decisions concerning occupational and professional licenses, and this may conflict with Article 8 of the Maryland Constitution's Declaration of Rights,<sup>75</sup> which requires separation of power between the three branches of state government. The Court of Appeals has held that the judicial function does not properly include deciding certain licensing issues, and it has struck down statutes that required courts to make such decisions on the grounds that they violated the separation of powers doctrine.<sup>76</sup> The Drug Enforcement Act of 1990 appears vulnerable to the same sort of constitutional challenge.

2. *The Act.*—The Drug Enforcement Act of 1990 began as an Administration bill, introduced into the legislature as House Bill 515.<sup>77</sup> The Administration envisioned that the Act would implement the Governor's Drug and Alcohol Abuse Commission's recommendations to change society's behavior and attitudes toward drug use.<sup>78</sup> The Act would "1. requir[e] drug-free accountability for individuals who seek and hold State licenses to engage in professions, occupations, trades, or businesses; and 2. restrict[] the use of probation before judg[ment] in controlled dangerous substance offense cases . . . ."<sup>79</sup>

The Act reflects a change in the legislature's strategy for combatting illegal drug use.<sup>80</sup> Whereas other recent legislation concen-

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73. See *id.* § 4.

74. Masters, *Drug Enforcement*, Md. B.J., July-Aug. 1990, at 7-8. The author was Vice Chairman of the House Judiciary Committee, which approved the Act's passage.

75. MD. CONST. DECL. OF RTS. art. 8.

76. See *infra* notes 102-122 and accompanying text.

77. Md. H.B. 515, 1990 Sess.

78. See The Drug Enforcement Act of 1990, ch. 410, 1990 Md. Laws 1666, 1670 (preamble); see also GOVERNOR'S DRUG AND ALCOHOL ABUSE COMM'N, MARYLAND'S DRUG AND ALCOHOL ABUSE CONTROL PLAN 56, 98-99 (1990). Executive Order No. 01.01.1989.04 in February 1989 established the Governor's Drug and Alcohol Abuse Commission, composed of public officials and private citizens, to develop a comprehensive plan for reducing illegal drug-related activities, and drug and alcohol abuse in Maryland. *Id.*

79. Ch. 410, 1990 Md. Laws at 1670.

80. See Masters, *supra* note 74, at 7-8.

trated on drug traffickers, the Drug Enforcement Act of 1990 focuses on drug users, and makes the legal consequences more severe.<sup>81</sup> The Act eliminates an older provision of the Maryland Code designed to spare "casual" drug users the stigma of a criminal record,<sup>82</sup> and it bars courts from granting probation before judgment for any second or subsequent drug offense.<sup>83</sup> The Act also requires courts to order drug treatment when ordering probation, probation before judgment, or a suspended sentence for drug offenders.<sup>84</sup>

The Act's licensing provisions are the first in the nation to link state-issued professional and occupational licenses to drug enforcement.<sup>85</sup> When an offender is sentenced for any drug offense,<sup>86</sup> the Act requires a court to determine whether the defendant holds an occupational or professional license.<sup>87</sup> If the defendant is a license holder and it is her first drug offense since the Act's effective date, the Act directs the court to:

make a *prima facie* finding of fact as to whether there is a relationship between the conviction and the license including: (i) The individual's ability to perform the tasks authorized by the license; (ii) Whether the public will be protected if the individual continues to perform the tasks authorized by the license; (iii) Whether the nature and the circumstances of the . . . offense warrant referral to the li-

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81. *Id.*

82. *See id.* at 8. Section 1 of the Act repealed the existing Maryland Code Article 27, § 292, which allowed courts to grant probation before judgment for first time drug offenders, and expunge their criminal arrest records at the end of the probationary period. Consequently, probation before judgment now can be granted only pursuant to Article 27, § 641, as amended by the Act. *See* ch. 410, § 1, 1990 Md. Laws at 1670.

83. *See* MD. ANN. CODE art. 27, § 641(a)(3) (Supp. 1990).

84. *See id.* at §§ 639(d), 641(a)(1)(iii), 641A(d).

85. *See* Masters, *supra* note 74, at 7. The Act defines "license" as "a license, permit, certification, registration, or other legal authorization:

(i) Issued to or granted to an individual by a licensing authority; and

(ii) Required for engaging in employment or an occupation or profession."

MD. ANN. CODE art. 41, § 1-403(c)(1) (1990). "License" includes a commercial driver's license but does not include an ordinary motor vehicle operator's license. *See id.* § 1-403(c)(2), (3). The definition expressly excludes a stock broker's license. *See id.* § 1-403(c)(3)(ii). The definition includes a license to practice law. *See id.* § 1-407(a)(2).

86. The Act applies to any offense under the "Health— Controlled Dangerous Substances" subheading in Article 27 (§§ 277-303), or any offense in another jurisdiction that would be an offense under that subheading if committed in Maryland. *See id.* § 1-403(b)(1), (2). This subheading includes all offenses for illegally trafficking, using, and possessing drugs and drug paraphernalia.

87. *See* MD. ANN. CODE art. 27, § 298A(c) (Supp. 1990).

censing authority; and (iv) Any other facts that the court deems relevant.<sup>88</sup>

If the court finds a "relationship" between the conviction and the individual's occupational or professional license, the clerk of the court must report the conviction to the administrative agency that issued the license.<sup>89</sup> In the case of a second or subsequent drug conviction, the clerk must report the conviction to the licensing agency without the court determining whether there was a relationship between the conviction and the license.<sup>90</sup>

Once the sentencing court's clerk informs a state administrative agency that a licensee was convicted of a drug offense, the agency may sanction the licensee by revoking or suspending the license, placing the licensee on probation, or taking any other action authorized by law.<sup>91</sup> In considering whether to impose sanctions, the licensing agency must consider the same four criteria the trial court used to determine whether there was a relationship between the conviction and the licensee's ability to perform tasks authorized by the license, as well as the effect sanctions might have on innocent third persons.<sup>92</sup>

The Act also authorizes licensing agencies to require new applicants and applicants for license renewals to disclose whether they have been convicted of a drug offense since the Act's effective date.<sup>93</sup> If an applicant has been convicted of a drug offense, the

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88. *Id.* § 298A(d)(2)(i)-(iv). The Act does not define "prima facie finding of fact," an expression that appears nowhere else in the Maryland Code or in the statutes of any other state. The term "prima facie" means literally "at first sight." BLACK'S LAW DICTIONARY 1071 (5th ed. 1979). It is usually used to describe the evidence offered in a case, however, and not the court's findings. For example, a "prima facie case" is evidence sufficient on its face, unless rebutted or contradicted. *See id.* Presumably the Act contemplates that a court will make such a "prima facie finding," without rigorous investigation, because the court's finding does not bind the licensee. The administrative agency that issued the license retains complete authority to sanction the licensee, and must conduct an independent investigation before doing so. *See* Opinion of the Attorney General addressed to the Honorable William Donald Schaefer at 3 (May 7, 1990) (unpublished; copy on file at *Maryland Law Review*); *infra* notes 91-92 and accompanying text. The fact that the court's finding is not definitive has constitutional implications, however. *See infra* notes 135-144 and accompanying text.

89. *See* MD. ANN. CODE art. 27, § 298A(e) (1990). The Act originally contained an incorrect cross-reference. Where it referred to "a prima facie finding . . . under subsection (c)," it should have referred to subsection (d). The legislature was advised to correct this error at the 1991 session. *See* Opinion of the Attorney General, *supra* note 88, at 3-4.

90. *See* MD. ANN. CODE art. 27, § 298A(e) (Supp. 1990).

91. *See id.* art. 41, § 1-405.

92. *See id.* § 1-407(b), (c); *supra* text accompanying note 88.

93. *See* MD. ANN. CODE art. 41, § 1-404 (1990).

agency may refuse to grant a license or grant it subject to restrictions.<sup>94</sup>

3. *The Separation of Powers Question.*—The doctrine of separation of powers, articulated in Article 8 of the Declaration of Rights of the Maryland Constitution,<sup>95</sup> “has long been a cornerstone of this State’s concept of government.”<sup>96</sup> Article 8 states: “That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.”<sup>97</sup>

In interpreting this constitutional provision, the Court of Appeals consistently has held unconstitutional statutes imposing a “nonjudicial function” on the State’s courts.<sup>98</sup> A precise definition of “nonjudicial function” has, however, eluded the Court of Appeals, which has generally relied on a “we know it when we see it” approach.<sup>99</sup> In *Board of Supervisors of Election v. Todd*,<sup>100</sup> one of the oldest and most frequently cited cases addressing this issue, the Court of Appeals declared:

It is quite unnecessary to undertake to define here the essential qualities of a judicial act or to prescribe the precise

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94. See *id.*

95. MD. CONST. DECL. OF RTS. art. 8.

96. *Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 218, 334 A.2d 514, 520 (1975).

97. MD. CONST. DECL. OF RTS. art. 8.

98. See, e.g., *Duffy v. Conway*, 295 Md. 242, 262, 455 A.2d 958, 965 (1983) (judicial function did not include collecting evidence and making findings regarding a contested election that only the House of Delegates was constitutionally authorized to decide); *Linchester Sand & Gravel*, 274 Md. at 229, 344 A.2d at 525 (trying de novo the Department of Natural Resources’ determination regarding an application for a building permit was a nonjudicial function); *Cromwell v. Jackson*, 188 Md. 8, 27, 52 A.2d 79, 88 (1947) (determining whether an applicant is fit to be issued a liquor license was a nonjudicial function); *Close v. Southern Md. Agricultural Assoc.*, 134 Md. 629, 644, 108 A. 209, 215 (1919) (issuing licenses for betting on horse races was a nonjudicial function); *Board of Supervisors of Election v. Todd*, 97 Md. 247, 264, 54 A. 963, 965 (1903) (determining whether there should be a referendum on granting liquor licenses was a nonjudicial function); *Beasley v. Ridout*, 94 Md. 641, 660, 52 A. 61, 66 (1902) (appointing supervisors of the county jail was a nonjudicial function); *Baltimore v. Bonaparte*, 93 Md. 156, 163, 48 A. 735, 737 (1901) (performing duties tantamount to a board of review in assessing property for tax purposes was a nonjudicial function); *Robey v. Prince George’s County*, 92 Md. 150, 160, 48 A. 48, 50 (1900) (auditing county officers’ accounts was a nonjudicial function).

99. See Tomlinson, *Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland*, 35 MD. L. REV. 414, 425 (1976); see also *Duffy*, 295 Md. at 260, 455 A. 2d at 964 (“no precise definition of ‘judicial function’ exists”).

100. 97 Md. 247, 54 A. 963 (1903).

limits to be observed by the legislative branch of the government in assigning duties to the judiciary. . . . It would not be practicable to lay down a rule for all cases . . . . It is only necessary . . . to say that [the duty assigned the courts by the legislature in this case] is not a judicial function, is a proposition that would seem too plain to need argument to enforce it.<sup>101</sup>

Nevertheless, the Court of Appeals' opinions as to whether a statute imposes on the courts a nonjudicial function provide some guidance in analyzing the constitutionality of the courts' role under the Drug Enforcement Act of 1990. These cases suggest that courts may construe as a nonjudicial function the Act's requirement that judges make a *prima facie* finding whether there is a relationship between an individual's drug conviction and his occupational or professional license.

*a. Case Law.*—In *Robey v. County Commissioners*,<sup>102</sup> the Court of Appeals struck down a statute that required courts to investigate the financial accounts of certain county officers. The court asserted that even though courts generally operate by investigating the issues before them, and the legislature had required that a court investigate these accounts before they could be paid, the "power" to audit county officers' accounts belonged to the county commissioners.<sup>103</sup> If courts performed this function, they would appropriate the function of another branch of government.<sup>104</sup> The court stated that "[s]uch a union of functions would be a menace to civil liberty."<sup>105</sup> *Robey* stressed that the types of tasks courts are required to perform do not determine whether the duty assigned is a judicial function. The nature of the court's duty, and ultimately its constitutionality, depends on the power it exercises in performing those tasks.<sup>106</sup>

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101. *Id.* at 264, 54 A. at 965.

102. 92 Md. 150, 48 A. 48 (1900).

103. *See id.* at 162, 48 A. at 51.

104. *See id.*

105. *Id.* at 161, 48 A. at 50.

106. The court stated:

The mere fact that a Judge is called on by statute to execute a certain function does not make the function a *judicial* function. . . . As said in *ex parte Candee*, 48 Ala. 399, "It by no means follows that a duty is judicial because it is to be performed by a Judge; if in its performance he does not exercise the powers that appropriately appertain to his judicial office, it is . . . not judicial, although its performance requires the exercise of his judgment."

*Robey*, 92 Md. at 162-63, 48 A. at 51 (emphasis in original).



In *Department of Natural Resources v. Linchester Sand and Gravel Corp.*,<sup>107</sup> the Court of Appeals explained how the state courts' power relates to the power of various state administrative agencies that issue permits and licenses. The court described administrative agency power as arising from a legislative delegation to promote the "health, safety, welfare and morals of the citizens of this State."<sup>108</sup> With respect to these agencies, the power of the court is limited to seeing that the agencies do not exceed their delegated power, and that they exercise it with procedural and substantive fairness.<sup>109</sup>

Thus, in *Linchester*, the Court of Appeals struck down a statute entitling applicants who were denied building permits by the Department of Natural Resources to a de novo trial in the circuit court.<sup>110</sup> Noting that the decision whether to grant a permit is made pursuant to the state's police power, the court held that this decision belonged exclusively to the legislature or the legislature's delegees, the administrative agencies.<sup>111</sup> The courts simply had no power to decide a question that was exclusively within the purview of another branch of government.<sup>112</sup>

In *Cromwell v. Jackson*,<sup>113</sup> the Court of Appeals struck down a statute requiring a court to determine whether an applicant for a liquor license was "fit" to hold such a license. The court held that this is a question of public policy requiring the legislature's discretion.<sup>114</sup> The court was especially concerned with the absence of statutory standards to guide a court in making such a decision, and it distinguished determining "fitness for licensing" from a proper judicial question on the ground that the former was too subjective for a court to decide.<sup>115</sup>

The Court of Appeals has also considered the sort of product that would result if courts were to perform particular tasks. In *Duffy v. Conway*,<sup>116</sup> the court held that an essential element of the judicial function is the production of a definitive ruling that cannot be reviewed by another branch of government.<sup>117</sup> Thus, the *Duffy* court

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107. 274 Md. 211, 334 A.2d 514 (1975).

108. *Id.* at 222, 334 A.2d at 522.

109. *Id.* at 223, 334 A.2d at 522-23.

110. *See id.* at 229, 334 A.2d at 525.

111. *See id.* at 227-28, 334 A.2d at 525.

112. *See id.* at 228, 334 A.2d at 525.

113. 188 Md. 8, 52 A.2d 79 (1947).

114. *See id.* at 26, 52 A.2d at 88 (citing *Beasley v. Ridout*, 94 Md. 641, 52 A. 61 (1902)).

115. *See id.* at 26-27, 52 A.2d at 88.

116. 295 Md. 242, 455 A.2d 955 (1983).

117. *See id.* at 261-62, 455 A.2d at 964-65.

declared unconstitutional a statute that required a court to investigate allegations of illegal campaign practices and then to transfer its findings to the House of Delegates,<sup>118</sup> the body constitutionally empowered to judge elections for the office in question.<sup>119</sup> The court noted that a "court's order under that [statute] 'binds nobody and determines nothing,' "<sup>120</sup> and held that the statute imposed on the courts a nonjudicial function.<sup>121</sup> A statute that requires a court to make a ruling wholly subject to the legislature's review violated the constitutionally mandated separation of the legislative and judicial branches.<sup>122</sup>

*b. Application.*—The principles derived from these cases when applied to the Drug Enforcement Act of 1990 suggest that by requiring courts to make a "prima facie finding of fact as to whether there is a relationship between [a drug] conviction and [an occupational or professional] license," the Act may also be imposing on the courts a nonjudicial function.<sup>123</sup>

In *Cromwell v. Jackson*,<sup>124</sup> the Court of Appeals stated that licenses are granted pursuant to the state's police power, and the legislature is the body properly empowered to regulate their issuance.<sup>125</sup> Courts may assist the legislature in this function by deciding questions of fact and law when called upon to do so,<sup>126</sup> but they are without authority to decide whether a person is "fit" to hold a license because that is a question of public policy requiring the legislature's discretion.<sup>127</sup>

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118. The statute at issue was a section of the "Fair Elections Practices" subtitle of the Election Code, MD. ANN. CODE art. 33, §§ 26-1 to -21 (1976). The courts' duties pursuant to that statute are discussed in *Duffy*, 295 Md. at 247-59, 455 A.2d at 957-64.

119. See 295 Md. at 249 & n.4, 455 A.2d at 958 & n.4.

120. *Id.* at 261, 455 A.2d at 964 (quoting *State ex rel. Haines v. Searle*, 59 Minn. 489, 492, 61 N.W. 553, 554 (1894)).

121. See *id.* at 262, 455 A.2d at 965.

122. See *id.* at 261-62, 455 A.2d at 965.

123. MD. ANN. CODE art. 27, § 298A(d)(2) (Supp. 1990).

124. 188 Md. 8, 52 A.2d 79 (1947); see *supra* notes 113-115 and accompanying text.

125. See 188 Md. at 25, 52 A.2d at 87.

126. See *id.* at 20-21, 52 A.2d at 85. In an earlier case, *McCrea v. Roberts*, 89 Md. 238, 43 A. 39 (1899), the Court of Appeals upheld a licensing statute requiring a court to determine such questions as whether applicants for liquor licenses were freeholders, and whether they lived in the neighborhood in which they proposed to sell alcohol, because these were questions of fact and law.

127. *Cromwell*, 188 Md. at 26, 52 A.2d at 88; see also *id.* at 24, 52 A.2d at 87 ("One must be careful, however, not to confuse this legislative discretion with judicial discretion." (quoting *Mitchell v. Wright*, 154 F.2d 924, 928 (5th Cir. 1946)).

Although the Drug Enforcement Act of 1990 refers to the courts' new duty as "mak[ing] a prima facie finding of fact"<sup>128</sup> whether there is a relationship between a drug conviction and an occupational or professional license, the court is asked to make a finding that closely resembles the "fitness for licensing" question the *Cromwell* court described as a question of neither fact nor law and, therefore, beyond the judiciary's purview.<sup>129</sup>

The Act provides four criteria for determining whether a "relationship" exists between an individual's drug conviction and the individual's occupational or professional license: (1) "[t]he individual's ability to perform the tasks authorized by the license;" (2) whether the public will be protected if the individual continues to perform those tasks; (3) the nature and circumstance of the drug offense; and (4) "[a]ny other facts that the court deems relevant."<sup>130</sup> The Act is similar to the statute struck down in *Cromwell*, however, because it provides no standards by which a court can determine whether the facts of a case constitute a "relationship."<sup>131</sup> What the Act refers to as a "finding of fact" is really a discretionary determination as to whether the licensee is still fit to hold a license, the outcome of which must depend on the judge's individual views concerning drug use, and the judge's personal impression of the occupation in which the defendant is licensed to work.<sup>132</sup> The *Cromwell* court made clear that the judicial function does not appropriately include decisionmaking based on the judge's individual views:<sup>133</sup>

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128. MD. ANN. CODE art. 27, § 298A(e) (Supp. 1990) (emphasis added).

129. See 188 Md. at 26, 52 A.2d at 88.

130. See *supra* note 88 and accompanying text.

131. See 188 Md. at 26, 52 A.2d at 88.

132. The subjective nature of the finding the legislature asks the courts to make becomes clear when one imagines the types of cases they would have to decide. In the case of a licensed surgeon, see MD. HEALTH OCC. CODE ANN. § 14-301 (1991) (licensing doctors), convicted of possessing drugs before an operation, presumably there would be a relationship between his license and the conviction. But is there a relationship if he is arrested while on vacation? Are the standards the same for a dentist? See MD. HEALTH OCC. CODE ANN. § 4-301 (1991). An acupuncturist? See MD. HEALTH OCC. CODE ANN. § 14-506 (1991). A barber? See MD. BUS. OCC. CODE ANN. § 4-301 (1989). A tree doctor? See MD. NAT. RES. § 5-416 (1989). What about beekeepers? See MD. AGRIC. CODE ANN. § 5-503 (1985).

133. Addressing a court's ability to determine whether an applicant was fit to hold a liquor license, the court stated: "Surely the Court, if acting judicially, cannot be governed by the individual views of the judges as to drinking." *Cromwell*, 188 Md. at 26, 52 A.2d at 88 (citing *Close v. Southern Md. Agricultural Ass'n*, 134 Md. 629, 642, 108 A. 209, 214 (1919)).

such decisions are questions of public policy for the legislative branch, not the courts, to decide.<sup>134</sup>

It has been suggested that under the Drug Enforcement Act of 1990 the courts' role does not violate the separation of powers doctrine because a court does not determine whether a licensee will be sanctioned, but merely informs the licensing agency that it has made a *prima facie* finding of a relationship between the licensee's drug conviction and the license.<sup>135</sup> Following the court's reasoning in *Duffy v. Conway*, however, the fact that the courts' findings are not binding is itself a violation of the constitutional requirement of separation of powers.<sup>136</sup>

The Act stipulates that after a court has notified a licensing agency of a licensee's drug conviction, the agency must conduct its own investigation to determine the appropriateness of sanctions,<sup>137</sup> basing its decision on the same four criteria the court applied in its *prima facie* finding.<sup>138</sup> Thus, the agency hears *de novo* the same issue heard by the court, but only the agency's decision is binding on the licensee.

This procedure closely resembles the procedure struck down by the Court of Appeals in *Duffy* because it imposed on the courts a nonjudicial function.<sup>139</sup> The *Duffy* court stated:

But [the legislature] cannot require the judiciary as a co-ordinate department of government to hold a trial and render a decision which in its nature must be purely tentative or advisory and wholly subject to its own review, revision, retrial or inaction. . . . It would subject a proceeding

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134. In *Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 334 A.2d 514 (1975), the Court of Appeals pointed out that the legislature is not only the body constitutionally empowered to decide the appropriate conditions for licensure, but its delegation of this power to experts in various administrative agencies has enabled it to competently cope with the technical, fact-specific cases that are common in our increasingly complex society. *See id.* at 218-20, 334 A.2d at 520-21. Allowing courts to apply their discretion to issues that administrative agencies are expert in deciding would only impede the effectiveness by which agencies can fulfill their missions to promote the public good. *See id.* at 228-29, 334 A.2d at 525.

135. *See* Opinion of the Attorney General, *supra* note 88, at 3. Although a court does not determine whether a licensee will be sanctioned, it determines that a licensee will *not* be sanctioned when it fails to find a relationship between the conviction and the license and, therefore, does not notify the licensing agency.

136. *See Duffy*, 295 Md. 242, 261-62, 455 A.2d 955, 964-65 (1983).

137. *See* MD. ANN. CODE art. 41, § 1-407 (1990); *see also* Opinion of the Attorney General, *supra* note 88, at 3 ("the [Act] clearly contemplates an independent assessment by the [licensing agency]").

138. *See* MD. ANN. CODE. art. 42, § 1-407(b) (1990).

139. *See supra* text accompanying notes 118-119.

arising in a court to modification, suspension, annulment or affirmation by a part of the legislative department of government before it would possess any definitive force. Manifestly this is a contravention of art. [8] of the Declaration of Rights which marks the entire separation of the legislative and judicial departments of the government.<sup>140</sup>

The Drug Enforcement Act of 1990 is similar to the statute struck down in *Duffy* because it requires a court to make a finding that has no "definitive force" until another branch of government reviews it.<sup>141</sup> The licensing agency retains complete power to sanction the licensee, and it is in no way bound by the court's "prima facie finding."<sup>142</sup> As the Court of Appeals said in *Duffy*: "The court's order under that section 'binds nobody and determines nothing.' This is not a judicial function under our holdings that a controversy, to be justiciable, must be 'capable of final adjudication by the judgment or decree to be rendered.'" <sup>143</sup>

The procedures prescribed by the Drug Enforcement Act of 1990 subordinate a court's power to that of an administrative agency by requiring the court to make a decision that has no force unless an administrative agency concurs in its findings. Regardless of whether it is a judicial function for a court to decide whether there is a "relationship" between a drug conviction and an occupational or professional license, putting the matter before a court while denying it the power to render a binding decision violates the constitutional requirement of separation of powers.<sup>144</sup>

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140. 295 Md. at 261-62, 455 A.2d at 965 (quoting *Dinan v. Swig*, 223 Mass. 516, 520, 112 N.E. 91, 94 (1916) (first brackets in original)).

141. For a discussion of how the administrative agencies fit into the three-branch division of state government, see *Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 218-23, 334 A.2d 514, 520-22 (1975).

142. See MD. ANN. CODE art. 41, § 1-407 (1990)); see also Opinion of the Attorney General, *supra* note 88, at 3 ("findings by the court are not binding on the [licensing agency]").

143. 295 Md. at 261, 455 A.2d at 964 (respectively quoting *State ex rel. Haines v. Searle*, 59 Minn. 489, 492, 61 N.W. 553, 554 (1894), and *Tanner v. McKeldin*, 202 Md. 569, 576-77, 97 A.2d 449, 452 (1953)).

144. In addition to the constitutional implications of the court's duties under the Act, it is worth noting that the procedures prescribed by the Act are extremely inefficient. If a court finds a relationship between the conviction and the license, the court must notify the licensing agency of the conviction. The licensing agency must then investigate the issue already considered by the court. See *supra* notes 137-138 and accompanying text. If the court fails to find a relationship, the licensing agency will still learn of the licensee's conviction when the licensee applies for a renewal, and the agency must then investigate the relationship between the conviction and license. See MD. ANN. CODE art. 41,

4. *Conclusion.*—The Drug Enforcement Act of 1990 is the State's innovative effort to respond to the problems caused by illegal drug use. But the Act prescribes a dubious role for the courts. Indeed, given the Court of Appeals' resistance to the imposition on the courts of nonjudicial functions, the governor and the legislature may find the courts reluctant to perform the new duties assigned to them.

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§ 1-404 (1990). Most occupational and professional licenses must be renewed every two years. Opinion of the Attorney General, *supra* note 88, at 3 n.4.

It would be more efficient if the clerk of the court notified licensing agencies of all licensee drug convictions. An automatic notification procedure such as this already exists for traffic violations, whereby the District Court notifies the Department of Motor Vehicles of all traffic convictions pursuant to section 1-605 (d)(4) of the Courts and Judicial Proceedings Article. *See* MD. CTS. & JUD. PROC. CODE ANN. § 1-605 (1989). In fact, until the Drug Enforcement Act of 1990 repealed it, section 298(c) of Article 27 required the clerk of the court to notify the licensing agency when someone holding an occupational or professional license was convicted of a drug offense. *See* MD. ANN. CODE art. 27, §§ 298(c), 298(c) (amendment) (Supp. 1990). Apparently, the courts largely ignored this section of the Code. *See* Masters, *supra* note 74, at 9.

Considering the burden that drug cases impose on the judicial system, it seems especially wasteful to involve the courts in this redundant process. Indeed, the opinions in which the Court of Appeals struck down statutes for imposing on the courts nonjudicial functions also reveal a concern about burdening the court with extra duties. *See, e.g.,* Board of Supervisors of Elections v. Todd, 97 Md. 247, 265, 54 A. 963, 965 (1903) (stating: "duties . . . could be imposed to such an extent as to seriously interfere with the duties of the judicial office"); Robey v. Prince George's County, 92 Md. 150, 160-61, 48 A. 48, 50 (1900) (a judge who performs nonjudicial tasks may "neglect his real judicial functions.>"). Requiring courts to notify licensing agencies of *all* drug convictions not only would avoid the troublesome constitutional conflicts discussed here; it also would prevent further burdening the courts with post-trial *prima facie* findings.

## X. PROPERTY

### A. Residential Exception to the Mechanics' Lien Statute

In *Reisterstown Lumber Co. v. Tsao*,<sup>1</sup> the Court of Appeals addressed whether the mechanics' lien statute's residential exception applies when homeowners who contracted to have a house built on their land and originally intended to use it as their residence, during construction placed it on the market for sale.<sup>2</sup> The case required the court to render its first interpretation of Real Property Article section 9-104(a)(2),<sup>3</sup> which protects from a subcontractor's mechanics' lien houses constructed for the landowner's residential use.<sup>4</sup> The court held that the owner's intent as of the time the subcontractor entered into a "substantially uninterrupted performance" of the construction contract determines whether the residential exception applies.<sup>5</sup> Here the court denied one of the subcontractors a lien<sup>6</sup> because the exception at issue applied to the homeowners.

Although the court appeared to leave intact the doctrine favoring lien claimants under the mechanics' lien statute,<sup>7</sup> it clarified the principle that residential exceptions are construed in the homeowner's favor. Consequently, Maryland subcontractors must be aware of the residential exception provisions, and demand protections from general contractors or homeowners before entering contracts to which section 9-104(a)(2) could apply.

1. *The Case*.—In 1986, the Tsaos contracted with L.W. Marino, Incorporated (Marino), a general contractor, to construct a single

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1. 319 Md. 623, 574 A.2d 307 (1990).

2. *See id.* at 624-25, 574 A.2d at 308.

3. MD. REAL PROP. CODE ANN. § 9-104(a)(2) (1988) provides that:

A subcontractor doing work or furnishing materials or both for or about a single family dwelling being erected on the owner's land for his own residence is not entitled to a lien under this subtitle unless, within 90 days after doing work or furnishing materials for or about that single family dwelling, the subcontractor gives written notice of an intention to claim a lien in accordance with subsection (a)(1) of this section and the owner has not made full payment to the contractor prior to receiving the notice.

*Id.*

4. The legislature added the residential exceptions to the mechanics' lien statute in 1982. *See* Act of May 20, 1982, ch. 251, 1982 Md. Laws 2520 (codified at MD. REAL PROP. CODE ANN. § 9-104(a)(2), (f)(3) (1988)). For the text of the two subsections, see *supra* note 3, *infra* note 39.

5. *See* 319 Md. at 631, 574 A.2d at 311.

6. *See id.*

7. *See infra* text accompanying notes 35-41.

family dwelling on their land.<sup>8</sup> When they entered the contract, the Tsaos intended to live in the completed house. They obtained a construction loan to finance the construction, and the lender advanced funds at scheduled progress points. The lender issued checks to the Tsaos, who then indorsed them to Marino.<sup>9</sup>

The Reisterstown Lumber Company (Reisterstown Lumber) was a subcontractor for construction of the Tsao residence, and supplied Marino with materials from January 1987 to December 1987. From January through June, Marino's obligations to Reisterstown Lumber were paid within the required thirty days. These payments totalled approximately \$44,995.<sup>10</sup> From July through the final delivery it received in December, however, Marino did not pay for materials delivered by Reisterstown Lumber. Excluding late fees, the unpaid bills amounted to approximately \$14,887.<sup>11</sup>

In early March 1987, the Tsaos discovered that a cemetery was visible from the second floor bedroom window.<sup>12</sup> The Tsaos' cultural and religious beliefs prohibited them from living in direct view of a cemetery. Accordingly, during the summer of 1987, they decided to sell the house upon its completion.<sup>13</sup> They listed the house with a real estate broker from October 1987 until approximately eight months later, when they took it off the market. During that time, they were not offered any contract of sale. The house remained vacant until they moved in during August 1988. They still occupied the house as of the date of the Court of Appeals' decision.<sup>14</sup>

The Tsaos made final payment to Marino on the construction contract in November 1987, which relieved them of all contractual obligations.<sup>15</sup> Marino suffered financial difficulties, however, and

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8. *Reisterstown Lumber*, 319 Md. at 626, 574 A.2d at 309.

9. *Id.*

10. *Id.*

11. *Id.* at 626-27, 574 A.2d at 309. The majority of these charges, in total, were due in July, the first month during which Marino failed to pay. *Id.* at 627, 574 A.2d at 309.

12. *Id.*

13. *Id.* The court did not state the Tsaos' religion but accepted without discussion that their religious convictions prompted their decision in the summer of 1987 to sell the house. *See id.*

14. *See id.* The court did not explain how the Tsaos overcame their cultural and religious objections to living in the house.

15. *Id.* at 627 & n.3, 574 A.2d at 309 & n.3. Although Marino had not furnished a required release of lien, *see* MD. REAL PROP. CODE ANN. § 9-114(a) (1988), all parties agreed that the Tsaos had made "full payment to the contractor," a requirement that the homeowner must meet when invoking § 9-104(a)(2). *See id.* § 9-104(a)(2); 319 Md. at 627 n.3, 574 A.2d at 309 n.3.



was unable to complete the construction. Work ceased in January 1988.<sup>16</sup> Because Marino failed to pay for supplies furnished by Reisterstown Lumber, the subcontractor notified the Tsao's on March 22, 1988 of its intention to claim a mechanics' lien. Reisterstown Lumber subsequently filed suit to enforce the lien on their property.<sup>17</sup>

At trial, the Tsao's invoked section 9-104(a)(2), which provides that "[a] subcontractor doing work or furnishing materials or both for or about a single family dwelling being erected on the owner's land for his own residence is not entitled to a lien . . . ."<sup>18</sup> Reisterstown Lumber argued that the residential exception did not protect the Tsao's because the house was not constructed for their residential use.<sup>19</sup> The trial court determined that the owner's intent was the key factor in determining section 9-104(a)(2)'s applicability. The court found that the phrase "being erected . . . for his own residence"<sup>20</sup> could require the court to measure the owner's intent in three possible ways: "(1) intent when the construction contract was signed, (2) the dominant intent over the total period of construction, and (3) intent when the subcontractor furnished materials for which the lien is sought."<sup>21</sup>

The trial court concluded that the second alternative best satisfied the legislative purpose for the residential exception, i.e., measuring the owner's dominant intent over the construction time.<sup>22</sup> Applying this test, the trial court determined that the Tsao's "primary and driving motivation" was to construct a house to use as their residence.<sup>23</sup> Consequently, the court denied the mechanics' lien. Reisterstown Lumber appealed the trial court's ruling, and the Court of Appeals issued a writ of certiorari on its own motion before the case reached the Court of Special Appeals.<sup>24</sup>

The issue before the Court of Appeals was "whether the 'residential exception' to the mechanics' lien law . . . applies when home-

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16. 319 Md. at 626, 574 A.2d at 309. Apparently the Tsao's either engaged another contractor to complete the construction, or it was sufficiently completed when Marino ceased construction, because in August of 1988 they moved into the house. *See id.* at 627, 574 A.2d at 309.

17. *Id.*

18. MD. REAL PROP. CODE ANN. § 9-104(a)(2) (1988); *see Reisterstown Lumber*, 319 Md. at 625, 574 A.2d at 308.

19. *See* 319 Md. at 625-26, 574 A.2d at 308.

20. MD. REAL. PROP. CODE ANN. § 9-104(a)(2) (1988).

21. 319 Md. at 626, 574 A.2d at 308.

22. *See id.* at 626, 574 A.2d at 309.

23. *Id.*

24. *See id.*

owners contract to have a single family dwelling built on their land with the intent to make it their residence, but, during the course of construction, decide to place the house on the market for sale.”<sup>25</sup> The court based its decision primarily on legislative intent, and held “that whether the improvements are ‘for [the owner’s] own residence’ is determined as of the time when the subcontractor commences an otherwise substantially uninterrupted performance of work for, or selling of materials to, the contractor.”<sup>26</sup> Accordingly, the court permitted the Tsaoes to invoke the residential exception to the mechanics’ lien law, and denied Reisterstown Lumber a lien on their home.

## 2. *Legal Background.*—

a. *Statutory.*—Mechanics’ liens were unknown at common law and are purely statutory creations.<sup>27</sup> In 1791, Maryland became the nation’s first state to enact a mechanics’ lien statute.<sup>28</sup> Today, all fifty states have some form of mechanics’ lien legislation.<sup>29</sup> These

25. *Id.* at 624-25, 574 A.2d at 308 (footnote omitted).

26. *Id.* at 631, 574 A.2d at 311 (brackets in original).

27. See S. PHILLIPS, A TREATISE ON THE LAW OF MECHANICS’ LIENS ON REAL AND PERSONAL PROPERTY 3 (1874); accord Comment, *Mechanics’ Liens—Potential Pitfall for the Homeowner*, 62 KY. L.J. 278, 279 (1973) [hereinafter Comment, *Mechanics’ Liens*]; Comment, *The Nebraska Construction Lien Act: Which Way to Lien?*, 62 NEB. L. REV. 86, 87 & n.7 (1983) [hereinafter Comment, *The Nebraska Construction Lien Act*]. See also *Freeform Pools, Inc. v. Strawbridge Home for Boys*, 228 Md. 297, 303, 179 A.2d 683, 686 (1962) (denying a mechanics’ lien on a swimming pool because such structures were not explicitly lienable under the Maryland mechanics’ lien statute, and because no common-law principles for mechanics’ liens exist); *In re Louisville Daily News & Enquirer*, 20 F. Supp. 465, 466 (W.D. Ky. 1937) (denying the claimant a mechanics’ lien because the Kentucky mechanics’ lien law requirements had not been satisfied, and no common law or equity principles could save the plaintiff’s claim).

28. See Act of Dec. 19, 1791, ch. 45, § 10, 1791 Md. Laws. See S. PHILLIPS, *supra* note 27, at 11 & n.2 (the General Assembly passed the mechanics’ lien statute at the urging of Thomas Jefferson and James Madison); Comment, *The Nebraska Construction Lien Act*, *supra* note 27, at 88 & n.10 (Maryland’s first mechanics’ lien statute “was enacted to stimulate and encourage the construction of Washington D.C.”).

29. See ALA. CODE §§ 35-11-210 to -234 (1975 & Supp. 1990); ALASKA STAT. §§ 34.35.050-.120 (1990); ARIZ. REV. STAT. ANN. §§ 33-981 to -1007 (1990); ARK. STAT. ANN. §§ 18-44-101 to -508 (1987 & Supp. 1990); CAL. CIV. CODE §§ 3110-3153 (West 1974 & Supp. 1990); COLO. REV. STAT. §§ 38-22-101 to -133 (1973 & Supp. 1990); CONN. GEN. STAT. §§ 49-33 to -92f (1989); DEL. CODE ANN. tit. 25, §§ 2701-2736 (1989 & Supp. 1990); FLA. STAT. §§ 713.01-.37 (1989 & Supp. 1990); GA. CODE ANN. §§ 44-14-360 to -365 (1982 & Supp. 1990); HAW. REV. STAT. §§ 507-41 to -49 (1988 & Supp. 1990); IDAHO CODE §§ 45-501 to -517 (1977 & Supp. 1990); ILL. REV. STAT. ch. 82, ¶¶ 1-39 (1989); IND. CODE ANN. §§ 32-8-3-1 to -15 (Burns 1980 & Supp. 1990); IOWA CODE §§ 572.1-.29 (1989); KAN. STAT. ANN. §§ 60-1101 to -1112 (1983 & Supp. 1990); KY. REV. STAT. ANN. § 376.010 (Baldwin 1981); LA. REV. STAT. ANN. §§ 9:4801-.4855 (West 1983 & Supp. 1990); ME. REV. STAT. ANN. tit. 10, §§ 3251-3269 (1980 & Supp. 1990);

statutes vary greatly from state to state; however, they generally follow the New York system or the Pennsylvania system.<sup>30</sup>

Under the New York system, a mechanics' lien is limited to the amount the homeowner owes the general contractor under the construction contract.<sup>31</sup> Thus, the subcontractor asserting a lien must demonstrate that the owner is still obligated to pay the general contractor at least the amount of the lien sought. The New York system protects the owner from being forced to pay twice for work performed on his property.<sup>32</sup>

The Pennsylvania system, which represents the majority view, offers homeowners no such protection. The system permits subcontractors to establish a lien for the value of work performed, regardless of how much, if anything, the owner owes to the general contractor.<sup>33</sup> This system is based on a theory of unjust enrichment:

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MD. REAL PROP. CODE ANN. §§ 9-101 to -114 (1988 & Supp. 1990); MASS. GEN. L. ch. 254, §§ 1-32 (1990); MICH. COMP. LAWS §§ 570.01-.30 (1967 & Supp. 1990); MINN. STAT. §§ 514.01-.17 (1990); MISS. CODE ANN. §§ 85-7-131 to -201 (1973 & Supp. 1990); MO. REV. STAT. §§ 429.010-.430 (1989); MONT. CODE ANN. §§ 71-3-521 to -563 (1989); NEB. REV. STAT. §§ 52-125 to -159 (1988 & Supp. 1990); NEV. REV. STAT. §§ 108.221-.246 (1986 & Supp. 1990); N.H. REV. STAT. ANN. §§ 447:1-.18 (1983 & Supp. 1990); N.J. REV. STAT. ANN. §§ 2A:44-64 to -142 (1990); N.M. STAT. ANN. §§ 48-2-1 to -19 (1978 & Supp. 1990); N.Y. LIEN LAW §§ 3-39c (McKinney 1966 & Supp. 1990); N.C. GEN. STAT. §§ 44A-7 to -23 (1984 & Supp. 1990); N.D. CENT. CODE §§ 35-27-01 to -28 (1980 & Supp. 1990); OHIO REV. CODE ANN. §§ 1311.01-.33 (Baldwin 1980 & Supp. 1990); OKLA. STAT. tit. 42, §§ 141-154 (1990); OR. REV. STAT. §§ 87.001-.093 (1988); PA. STAT. ANN. tit. 49, §§ 1101-1902 (Purdon 1965 & Supp. 1990); R.I. GEN. LAWS §§ 34-28-1 to -36 (1984 & Supp. 1990); S.C. CODE ANN. §§ 29-5-10 to -430 (Law. Co-op. 1977 & Supp. 1990); S.D. CODIFIED LAWS ANN. §§ 44-9-1 to -49 (1983 & Supp. 1990); TENN. CODE ANN. §§ 66-11-101 to -207 (1982); TEX. REV. CIV. STAT. ANN. art. 5452-5472c (Vernon 1958 & Supp. 1990); UTAH CODE ANN. §§ 38-1-1 to -26 (1974 & Supp. 1990); VT. STAT. ANN. tit. 9, §§ 1921-1928 (1984 & Supp. 1990); VA. CODE ANN. §§ 43-1 to -23.2 (1990); WASH. REV. CODE §§ 60.04.010-.255 (1990); W. VA. CODE §§ 38-2-1 to -39 (1985); WIS. STAT. ANN. §§ 779.01 to .17 (West 1981 & Supp. 1990); WYO. STAT. §§ 29-2-101 to -109 (1988).

30. See 53 AM. JUR. 2d *Mechanics' Liens* § 8 (1970).

31. See Comment, *Mechanics' Liens and Surety Bonds in the Building Trades*, 68 YALE L.J. 138, 142 (1958) [hereinafter Comment, *Mechanics' Liens and Surety Bonds*]; see also Comment, *Mechanics' Liens*, *supra* note 27, at 279; Comment, *The Nebraska Construction Lien Act*, *supra* note 27, at 90 (the amount owed is determined as of the time notice of the lien is given).

32. See Comment, *Mechanics' Liens and Surety Bonds*, *supra* note 31, at 142-43. For cases applying the New York rule, see *State v. Tabasso Homes, Inc.*, 42 Del. 110, 28 A.2d 248 (1942); *Foley Lumber Co. v. Koester*, 61 So. 2d 634 (Fla. 1952); *Larkin v. McMullin*, 120 N.Y. 206, 24 N.E. 447 (1890); *Michael Flynn Mfg. Co. v. J.L. Coe Constr. Co.*, 259 N.C. 649, 131 S.E.2d 487 (1963); *Knight v. Ferrante*, 202 Va. 243, 117 S.E.2d 283 (1960).

33. See Comment, *Mechanics' Liens and Surety Bonds*, *supra* note 31, at 144-45; see also Comment, *Mechanics' Liens*, *supra* note 27, at 279; Comment, *The Nebraska Construction Lien Act*, *supra* note 27, at 91.

the owner receives the benefit of the subcontractor's work, and consequently must pay the subcontractor the value of the work performed.<sup>34</sup>

Maryland followed the Pennsylvania system until 1982.<sup>35</sup> Maryland subcontractors could establish a lien for the work's value upon proof of performance and nonpayment; the amount of the owner's remaining obligation to the general contractor was irrelevant.<sup>36</sup> The Court of Appeals has stated that because the mechanics' lien statute was created for the benefit and protection of subcontractors and materialmen, it should be interpreted in their favor.<sup>37</sup>

In 1982, legislation was passed converting Maryland to the New York system.<sup>38</sup> The residential exceptions to the mechanics' lien statute limit a subcontractor's lien to the amount the owner owes the general contractor under the construction contract.<sup>39</sup> Thus, the subcontractor cannot establish a lien if the owner paid the general

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34. See Comment, *Nebraska Construction Lien Act*, *supra* note 27, at 91; see also Comment, *Mechanics' Liens*, *supra* note 27, at 279. For cases applying the Pennsylvania rule, see *Petaluma Bldg. Materials, Inc. v. Foremost Properties, Inc.*, 180 Cal. App. 2d 83, 4 Cal. Rptr. 268 (1960); *Bowen v. Phinney*, 162 Mass. 593, 39 N.E. 283 (1895); *Baldrige v. Morgan*, 15 N.M. 249, 106 P. 342 (1910); *Bryan v. Stempkowski*, 88 Pa. Super. 390 (1926); *H. & M. Heating Co. v. Andrae*, 35 Wis. 2d 1, 150 N.W.2d 379 (1967).

35. See MD. REAL PROP. CODE ANN. § 9-104 (1974) (amended 1982).

36. Before its 1982 amendment, § 9-104(a) provided in relevant part that "[a] subcontractor is not entitled to a lien under this subtitle unless, within 90 days after doing the work or furnishing the materials, he gives written notice of his intention to claim a lien substantially in the form specified . . ." *Id.* § 9-104(a).

37. See *Johnson v. Metcalfe*, 209 Md. 537, 543, 121 A.2d 825, 828 (1956) (although a contractor is liable to the homeowner for inadequacies in performance, the contractor may still recover amounts due based on work performed properly); see also *Frank J. Klein & Sons v. Laudeman*, 270 Md. 152, 162, 311 A.2d 780, 785-86 (1973) (minimal grading and pouring of concrete footers, and the owner's intent to continue construction, satisfy the requirement that there be a "commencement of a building" before a mechanics' lien can attach); *Clarke Certified Concrete Co. v. Lindberg*, 216 Md. 576, 582, 141 A.2d 685, 688 (1958) (enforcing a lien on the homeowners' property if prior to the date of the homeowner's purchase, the supplier provided materials for construction of the development that included the homeowner's dwelling); *T. Dan Kolker, Inc. v. Shure*, 209 Md. 290, 296, 121 A.2d 223, 226 (1956) (if lumber was delivered at different times pursuant to a vague offer and acceptance, the deliveries would constitute a single matter for settlement through a mechanics' lien action).

38. See Act of May 20, 1982, ch. 251, 1982 Md. Laws 2520 (codified at MD. REAL PROP. CODE ANN. § 9-104(a)(2), (f)(3) (1988)).

39. See MD. REAL PROP. CODE ANN. § 9-104(f)(3) (1988). This section states:

Notwithstanding any other provision of this section to the contrary, the lien of the subcontractor against a single family dwelling being erected on the land of the owner for his own residence shall not exceed the amount by which the owner is indebted under the contract at the time the notice is given.

*Id.* The Court of Appeals refers to this section and § 9-104(a)(2) as the "residential exception provisions."

contractor in full on the construction contract. The new legislation's scope is limited, because it applies only to situations involving a contract for construction of a single family dwelling, to be built on the owner's land, and to be used as the owner's residence.<sup>40</sup> The residential exception's effect on an owner's liability to a subcontractor is not fully developed because Maryland courts have addressed only one relevant case.<sup>41</sup>

*b. Case Law.*—*Ridge Sheet Metal Co. v. Morrell*<sup>42</sup> is the only case prior to *Reisterstown Lumber* that required interpretation of the residential exceptions. In that case, the Morrells contracted with a general contractor, Hunter, for construction of a single family dwelling on their land and for use as their residence.<sup>43</sup> The contract provided that the Morrells would pay eighty percent of the contract price in scheduled progress payments. The Morrells would hold the twenty percent balance until Hunter completed construction, at which time the twenty percent would serve as the final payment.<sup>44</sup>

Hunter hired Ridge to install a heat pump in the Morrell's house.<sup>45</sup> Ridge completed the first phase of the job and billed Hunter for the work as provided in the contract, but Hunter did not pay.<sup>46</sup> After receiving the Morrells' last progress payment, Hunter ceased work before he finished the house.<sup>47</sup>

Ridge properly notified the Morrells, and filed for a mechanics' lien. The Morrells opposed the lien, arguing that they had paid Hunter all that the contract required, and were entitled to keep the twenty percent until work was completed.<sup>48</sup> They based this argument on section 9-104(f)(3), which limits the amount of a subcontractor's lien to "the amount by which the owner is indebted under the contract at the time the notice is given."<sup>49</sup>

The court addressed the question whether the twenty percent retained by the Morrells was to be considered in determining whether they had made full payment when the lien notice was re-

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40. See *supra* note 3.

41. See *Ridge Sheet Metal Co. v. Morrell*, 69 Md. App. 364, 372-73, 517 A.2d 1133, 1137 (1986) (interpreting MD. REAL PROP. CODE ANN. § 9-104(f)(3) (1988)).

42. *Id.*

43. *Id.* at 366, 517 A.2d at 1134.

44. *Id.*

45. *Id.*

46. *Id.* at 367, 517 A.2d at 1134.

47. *Id.*

48. *Id.*, 517 A.2d at 1135.

49. MD. REAL PROP. CODE ANN. § 9-104(f)(3) (1988). For the full text of this section, see *supra* note 39.

ceived.<sup>50</sup> The court ruled in the Morrells' favor, stating that under section 9-104(f)(3), "a subcontractor may only establish a lien up to the amount of an enforceable obligation of the owner to the prime contractor. . . . This holding is based on the language of the contract, the legislative intent behind the applicable statutory provisions, and manifest fairness."<sup>51</sup> The discussion following the holding indicated that courts would construe the provisions in the homeowner's favor when the residential exception is at issue.<sup>52</sup>

According to the *Ridge Sheet Metal* court, by enacting the residential exception the legislature intended in limited situations to shift the risk of loss from homeowners to subcontractors.<sup>53</sup> Manifest fairness places the risk of loss on the party that can best protect itself.<sup>54</sup> The court reasoned that the subcontractor has knowledge of the construction trade and its local players, and is therefore better able to determine when a contractor is financially unstable.<sup>55</sup> A subcontractor can protect itself from nonpayment by requiring that the owner pay it and the general contractor as joint payees,<sup>56</sup> or by filing suit against the general contractor to collect amounts owed.<sup>57</sup> The *Ridge Sheet Metal* case suggests that when the residential exception provisions are at issue, courts will override the old rule favoring materialmen, and find for the homeowner.

### 3. Analysis.—

a. *Legislative Intent.*—In *Reisterstown Lumber Co.*, the Court of Appeals supported its holding by pointing to the legislative purpose of the residential exceptions to the mechanics' lien law. It noted that their "clear purpose is to protect from double payment the owner of a 'single family dwelling being erected on the owner's land for his own residence.' "<sup>58</sup> Although the court offered little support for its conclusions regarding legislative intent, the support does

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50. See *Ridge Sheet Metal*, 69 Md. App. at 368, 517 A.2d at 1135. If the amount retained was considered an existing obligation under the contract, a lien could be established up to that amount. If the Morrells were not considered indebted under the contract, no lien could be established. See *id.* at 371, 517 A.2d at 1136-37.

51. *Id.* at 372-73, 517 A.2d at 1137.

52. See *id.* at 374-75, 517 A.2d at 1138.

53. See *id.* at 374, 517 A.2d at 1138.

54. See *id.* at 375, 517 A.2d at 1138.

55. See *id.* at 374-75, 517 A.2d at 1138.

56. *Id.* at 375, 517 A.2d at 1138.

57. *Id.*, 517 A.2d at 1138-39. Whether this is a practical option is another matter, considering the length and cost of litigation.

58. 319 Md. 623, 628, 574 A.2d 307, 309 (1990) (quoting MD. REAL PROP. CODE ANN. § 9-104(a)(2) (1988)).

exist.<sup>59</sup>

The court supported its conclusion that legislative intent favored homeowners by discussing analogous situations in which it denied liens because of legislative policy.<sup>60</sup> For example, under section 9-102(d),<sup>61</sup> realty conveyed to a bona fide purchaser for value will not be subjected to a lien for the seller's antecedent debts; this is true even if the building is residential.<sup>62</sup> And courts may not issue a mechanics' lien for the seller's antecedent debts when only the property's equitable title has been transferred to a bona fide purchaser for value.<sup>63</sup> This holds true even if the lien petition is filed before the purchaser acquires the deed.<sup>64</sup>

In these examples, the purchaser paid for the dwelling in part or in full and received an interest in the land; therefore, a mechanics' lien based on antecedent debts could not attach. Although not directly related to section 9-104(a)(2), these circumstances indicate that courts need not always favor the materialman in a mechanics' lien case. By drawing these analogies, the court seems to indicate that it is legislative and not judicial policy which, in special circumstances, favors the homeowner over the materialman.

However valid the court's analogy, there is more substantial evidence of the legislature's intent behind section 9-104(a)(2). Senator Dorman of Prince George's County, sponsor of the residential

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59. See *infra* notes 65-68 and accompanying text.

60. See *Reisterstown Lumber*, 319 Md. at 630, 574 A.2d at 310-11.

61. MD. REAL PROP. CODE ANN. § 9-102(d) (1988). This section provides: "[A] building or the land on which the building is erected may not be subjected to a lien under this subtitle if, prior to the establishment of a lien in accordance with this subtitle, legal title has been granted to a bona fide purchaser for value." *Id.*

62. See *Reisterstown Lumber*, 319 Md. at 630, 574 A.2d at 310-11.

63. See *id.* at 630, 574 A.2d at 311; see also *Himmighoefer v. Medallion Indus., Inc.*, 302 Md. 270, 281, 487 A.2d 282, 287-88 (1985). In *Himmighoefer*, the subcontractor, Medallion, furnished work and materials to construction sites owned by Ridgely Builders. See *id.* at 271, 487 A.2d at 282. Ridgely contracted to sell one of its properties to the Himmighoefers, pursuant to which the Himmighoefers gave Ridgely a \$5,000 deposit. *Id.*, 487 A.2d at 283. After the parties signed the sale contract, the subcontractor petitioned to establish a lien naming only Ridgely as the defendant. Ridgely then conveyed the property to the Himmighoefers, who paid Ridgely the full purchase price. When Ridgely failed to respond to a show cause order on the subcontractor's petition, a default decree was entered establishing a lien on the Himmighoefer's home. The Himmighoefers received notice of the lien when they saw that their properties were advertised for sale. *Id.* After permitting the Himmighoefers intervention and vacating the original lien judgment, the trial court issued a new order establishing the lien, effective against the Himmighoefers. *Id.* at 271-72, 487 A.2d at 283. On appeal, the Court of Appeals held that because the Himmighoefers obtained equitable title before the petition for the lien was filed, a mechanics' lien could not reach their interest in the property. See *id.* at 281, 487 A.2d at 287-88.

64. See *Himmighoefer*, 302 Md. at 281, 487 A.2d at 287-88, discussed *supra* note 63.

exception legislation, stated its intended purpose in a letter to Carvel Payne.<sup>65</sup> Senator Dorman asked Mr. Payne whether they could "draft a bill that removes the property owner from any type of liability in regard to mechanic[s'] liens if the property owner pays the prime contractor in full?"<sup>66</sup> Dorman expressed his concern about subjecting property owners to double payment for construction on their homes.<sup>67</sup> Additionally, the senate bill containing the residential exceptions states that its purpose is to limit an owner's liability to subcontractors to the extent that the owner has paid the general contractor.<sup>68</sup>

The legislative history demonstrates that the General Assembly amended the mechanics' lien statute to protect homeowners by shifting the risk of loss to the subcontractor. Thus, although the *Reisterstown Lumber* court made conclusions without adequate support about the legislative intent behind section 9-104(a)(2), there is evidence to substantiate its conclusion.

. *b. The Homeowner's Intent.*—The court also discussed problems with relying heavily on the owner's subjective intent over the construction period as the basis for determining section 9-104(a)(2)'s applicability.<sup>69</sup> The court observed that normal events alter people's plans, and it is not unusual for a couple having a house built to vary their intent throughout the construction period.<sup>70</sup> The court concluded that the General Assembly did not envision basing the residential exception on the owners' subjective intent during the construction period.<sup>71</sup> Not only would the claimant's burden of proving the owners' subjective intent over the entire course of construction be extremely difficult, but the residential exception would depend too heavily on the unpredictable conduct of persons with whom the lien claimant has no privity.<sup>72</sup> The Court of Appeals therefore rejected the predominant intent approach taken by the lower court. The court did not believe that the legislature intended

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65. See letter from Senator Arthur Dorman to Carvel Payne, Director of the Department of Legislative Reference (Nov. 6, 1981), concerning Maryland Senate Bill 135 (1982 Sess.) (available on microfilm in the University of Maryland Marshall Law Library).

66. *Id.*

67. *See id.*

68. See Act of May 20, 1982, ch. 251, 1982 Md. Laws 2520.

69. See *Reisterstown Lumber*, 319 Md. at 631, 574 A.2d at 311.

70. *See id.* at 630-31, 574 A.2d at 311.

71. *See id.* at 631, 574 A.2d at 311.

72. *See id.* The court seemed concerned about the potentially onerous burden upon a subcontractor of proving a third party's subjective intent. *Id.*



the residential exception to be a complex, difficult piece of legislation: a simple approach should be taken.<sup>73</sup> Considering the alternative approach's possible complexity, the court chose a method that preserves judicial efficiency and does not overburden homeowners or subcontractors.

c. *Contract Law*.—The court presented a final reason for its decision, based on principles of contract law. When Reisterstown Lumber entered into the contract with Marino, the Tsaos intended to use the house as their residence.<sup>74</sup> Reisterstown Lumber, therefore, entered into the contract with the knowledge that its only recourse would be against the contractor, provided that the Tsaos paid the construction contract in full. By continuing to extend credit to Marino after the Tsaos decided to sell the house, Reisterstown Lumber showed that it believed Marino likely would be its only source of payment. The subcontractor could not later force the Tsaos to take responsibility for its poor judgment.<sup>75</sup>

Although valid, the court's reasoning would have had more force had it been coupled with the "manifest fairness" concept presented in *Ridge Sheet Metal*.<sup>76</sup> The facts of the *Reisterstown Lumber* case fit squarely within the manifest fairness framework. Reisterstown Lumber knew in August 1987 that Marino was having financial difficulties; the Tsaos were unaware of the problems until January 1988.<sup>77</sup> If Reisterstown Lumber wanted to protect itself from further losses, it could have sought Marino's assurance of performance, and ceased deliveries if Marino failed to provide the assurance and pay off its balance.<sup>78</sup> Instead, the subcontractor

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73. See *id.* The court's approach is much simpler than the predominant intent approach because it allows the subcontractor, contractor, and homeowner to rely on the owner's initial intent.

74. See *id.*

75. See *id.*

76. See *Ridge Sheet Metal*, 69 Md. App. at 374-76, 517 A.2d at 1138-39. For some unstated reason, *Reisterstown Lumber* does not mention *Ridge Sheet Metal*. While *Ridge Sheet Metal* concerned § 9-104(f)(3), and *Reisterstown Lumber* concerned § 9-104(a)(2), the provisions had the same purpose and were enacted together. In addition, the court in *Reisterstown Lumber* used the same analysis employed in *Ridge Sheet Metal*. See generally *id.*

77. See *Reisterstown Lumber*, 319 Md. at 626-27, 574 A.2d at 309. Reisterstown Lumber required Marino to pay each bill within 30 days. Reisterstown Lumber therefore should have known in August 1987 that its July bill had not been paid. Nothing in the opinion indicates that the Tsaos were aware of Marino's financial difficulties. The fact that the Tsaos paid the final draw to Marino in November 1987 indicates that they were unaware at that time of Marino's problems. See *id.* at 627, 547 A.2d at 309.

78. See MD. COM. LAW CODE ANN. § 2-609(1) (1975). This section provides:

A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reason-

allowed Marino's debt to become overdue for five months of deliveries.<sup>79</sup> Alternatively, Reisterstown Lumber could have filed for a mechanics' lien when Marino first defaulted in July 1987. If Reisterstown Lumber had acted promptly, the Tsaos would have been aware of the problem, and could have withheld payments to Marino to cover the debt owed Reisterstown Lumber. It would be unjust to force the Tsaos, the party lacking knowledge of Marino's financial difficulties, to reimburse the subcontractor that failed to protect itself in spite of knowing that the general contractor was in financial trouble.

Notwithstanding the court's failure to recognize the import of the *Ridge Sheet Metal* decision, and the absence of substantive support for its conclusions about legislative intent, the court made a logical decision in finding for the Tsaos. It concluded that, in order to further the "fair and workable legislative purpose" of section 9-104(a)(2),<sup>80</sup> whether the owners intend to use the dwelling as their residence is to be determined as of the time that the subcontractor begins a substantially uninterrupted performance of the construction contract.<sup>81</sup> Reisterstown Lumber was denied a mechanics' lien against the Tsaos' house because in January 1987, when it began substantially uninterrupted performance, the Tsaos intended to use the single family dwelling as their residence.<sup>82</sup>

*d. Consequences.*—*Reisterstown Lumber* limits homeowners' liability to subcontractors to the extent that the owner has paid the general contractor. Although the new legislation offers homeowners some protection, Maryland lower courts still view the mechanics' lien statute as a protection to materialmen and subcontractors and, in general, continue to construe the statute in their favor.<sup>83</sup> The Court of Appeals' reasoning indicates a movement away from the

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able grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

*Id.*

79. See *Reisterstown Lumber*, 319 Md. at 627, 574 A.2d at 309. In fact, the earliest unpaid bills were also the highest. See *supra* note 11.

80. *Reisterstown Lumber*, 319 Md. at 631, 574 A.2d at 311.

81. See *id.*

82. See *id.*

83. See, e.g., *Ridge Sheet Metal Co. v. Morrell*, 69 Md. App. 364, 369, 517 A.2d 1133, 1136 (1986); see also *Cabana, Inc. v. Eastern Air Control, Inc.*, 61 Md. App. 609, 619, 487 A.2d 1209, 1213-14 (1985) (enforcing a mechanics' lien on the lessee's building against a lessor, after the building was forfeited to the lessor upon the lessee's breach of the lease).

doctrine favoring materialmen. The *Reisterstown Lumber* decision, along with the *Ridge Sheet Metal* decision and legislative history of section 9-104(a)(2), has established that when a residential exception is at issue, the mechanics' lien statute will be liberally construed in the homeowner's favor.

The decision is not overly burdensome to subcontractors; there are many ways in which a subcontractor can protect itself against loss. If a subcontractor enters into a contract involving the construction of a single family dwelling, it should determine whether the residential exception applies. If the exception applies, the subcontractor should require the owner to issue progress payment checks payable jointly to the subcontractor and the general contractor.<sup>84</sup> Alternatively, the subcontractor could require the general contractor to obtain a surety or performance bond<sup>85</sup> such that if the general contractor becomes insolvent, the surety company will pay amounts owed to subcontractors, or complete the contract's performance. Subject to time and monetary constraints, a subcontractor could also file a suit against the general contractor to recover debts owed for work performed.<sup>86</sup> In any case, the prudent subcontractor must be aware of the nature of the construction project in which it is involved, and should seek alternate methods of protection when section 9-104(a)(2) prevents a mechanics' lien.

4. *Conclusion.*—The residential exceptions provide necessary protection to homeowners who enter construction contracts with little or no knowledge of the general contractor's financial status, or the operations of the construction industry. In granting liberal construction of section 9-104(a)(2) in favor of the homeowner, the *Reisterstown Lumber* court assured effective enforcement of the legislature's intended protections.

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84. See *Ridge Sheet Metal*, 69 Md. App. at 375, 517 A.2d at 1138.

85. A surety bond is "a bond issued by one party, the surety, guaranteeing that he will perform certain acts promised by another or pay a stipulated sum, up to the bond limit, in lieu of performance, should the principle fail to perform." BARRON'S LAW DICTIONARY 52 (2d ed. 1984). A performance bond is a "contractor's bond, guaranteeing that the contractor will perform the contract and providing that, in the event of default, the surety may complete the contract or pay damages up to the bond limit." *Id.* at 52.

86. See *Ridge Sheet Metal*, 69 Md. App. at 375, 517 A.2d at 1138-39.

## XI. TAXATION

### A. Workers' Compensation Assessments

In *Workmen's Compensation Commission v. Property & Casualty Insurance Guaranty Corp.*,<sup>1</sup> the Court of Appeals considered in light of article 48A, section 515,<sup>2</sup> which exempts the Property and Casualty Insurance Guaranty Corporation (PCIGC) from tax payments, whether PCIGC is required to pay assessments levied by the Workmen's Compensation Commission.<sup>3</sup> The Workmen's Compensation Commission attempted to collect assessment payments from PCIGC, as it does from other employers or their insurers, to fund the Subsequent Injury Fund (SIF) and the Uninsured Employers' Fund (UEF).<sup>4</sup> The court held that SIF and UEF assessments are taxes from which PCIGC is exempt.<sup>5</sup> Thus, without departing substantially from prior law,<sup>6</sup> the court brought Maryland into conformity with other states that have considered similar issues.<sup>7</sup>

The Property and Casualty Insurance Guaranty Corporation is a statutorily created, nonprofit entity designed "to provide a mechanism for the prompt payment of covered claims under certain insurance policies and to avoid financial loss to residents of Maryland who are claimants or policyholders of an insurer . . . which has become insolvent . . . ."<sup>8</sup> Subject to applicable policy limits and conditions, PCIGC is liable for "covered claims" that could have been brought against the insurer, including workers' compensation claims.<sup>9</sup> PCIGC is statutorily exempt from paying all fees and taxes imposed by the State or any of its subdivisions, except for taxes lev-

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1. 319 Md. 1, 570 A.2d 323 (1990).

2. MD. ANN. CODE art. 48A, § 515 (1986 & Supp. 1990).

3. See 319 Md. at 2-4, 570 A.2d at 323-24.

4. *Id.* at 4, 570 A.2d at 324.

5. See *id.* at 11, 570 A.2d at 328.

6. See *infra* notes 37-44 and accompanying text.

7. See *infra* notes 45-54 and accompanying text.

8. MD. ANN. CODE art. 48A, § 504 (1986 & Supp. 1990).

9. See *id.* § 508(a)(1)(i). This subsection provides that PCIGC shall:

Except as to surety bonds, be obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency. . . . [B]ut such obligation shall include only that amount of each covered claim which is in excess of \$100 and less than \$300,000. However, [PCIGC] shall pay the full amount of any covered claim arising out of a workmen's compensation policy. In no event shall [PCIGC] be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises.

*Id.*

ied on real or personal property.<sup>10</sup>

Maryland Workers' Compensation law<sup>11</sup> requires employers, or the employer's insurance carrier, to pay a percentage of all awards or settlement agreements for permanent disability, to the SIF<sup>12</sup> and the UEF.<sup>13</sup> Employers pay these assessments in addition to any compensation they pay to employees,<sup>14</sup> and the State Treasurer holds, manages, and disburses these funds.<sup>15</sup>

The legislature created the Subsequent Injury Fund to encourage employers to hire handicapped workers by limiting the employer's liability for worker's compensation.<sup>16</sup> When a previously disabled or injured employee sustains work related injuries, the employer is liable for normal workers' compensation if the employee suffers the injury while in the employer's service.<sup>17</sup> The SIF then pays the employee an additional amount to make the total compen-

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10. *See id.* § 515. "The [PCIGC] shall be exempt from payment of all fees and all taxes levied by this State or any of its subdivisions except taxes levied on real or personal property." *Id.*

11. *See generally* MD. ANN. CODE art. 101 (1985 & Supp. 1990).

12. *See id.* § 66(2)(a). SIF assessments are calculated as six and one-half percent of all awards rendered against the employer:

The Workmen's Compensation Commission shall assess a percentage amount, to be made payable to the Subsequent Injury Fund, on all awards rendered against an employer, or, if insured, the employer's insurance carrier or the Injured Workers' Insurance Fund, for permanent disability and death . . . and also on all amounts payable . . . pursuant to settlement agreements . . . as follows:

(i) .5 percent as to awards and settlement agreements approved on and after June 1, 1963 and prior to July 1, 1987; and

(ii) 6-1/2 percent as to all awards and settlement agreements approved on and after July 1, 1987. . . .

*Id.*

13. *See id.* § 91(d)(3)(i). UEF assessments are calculated as one percent of awards: An employer, or, if insured, the employer's insurance carrier or the Injured Workers' Insurance Fund, as the case may be, shall pay to the Uninsured Employers' Fund an amount equal to 1 percent of all awards rendered against the employer for permanent disability or death, including awards for disfigurement or mutilation, and 1 percent of all amounts payable by the employer (or his insurance carrier or the Injured Workers' Insurance Fund) pursuant to settlement agreements approved by the Commission. . . .

*Id.*

14. *See id.* §§ 66(2)(c), 91(d)(3)(iii).

15. *See id.* §§ 66(2)(d), 92.

16. *See McKenzie v. C.C. Kottcamp & Sons*, 311 Md. 54, 57, 532 A.2d 703, 704 (1987) (the SIF's purpose in limiting liability is to encourage employers to hire handicapped persons); *Subsequent Injury Fund v. Thomas*, 275 Md. 628, 633-34, 342 A.2d 671, 674-75 (1975) (SIF's purpose is to persuade employers to hire handicapped individuals by limiting the employer's liability). Although cited for this proposition in *Property & Casualty Insurance*, article 101 does not state explicitly that the SIF's purpose is to encourage employers to hire the handicapped.

17. *See* MD. ANN. CODE art. 101, § 66(1) (1985 & Supp. 1990). The Workers' Com-

sation equal to the amount that would be due for the combined effects of the employee's impairment and subsequent injury.<sup>18</sup>

The statutorily-created Uninsured Employers' Fund was designed to pay workers' compensation claims against uninsured employers.<sup>19</sup> The UEF has a statutory ceiling of \$2,500,000; if the fund reaches this amount, the Workmen's Compensation Commission discontinues making assessments.<sup>20</sup> The UEF also has a statutory floor of one million dollars; if the fund drops below this, assessments resume.<sup>21</sup>

1. *The Case.*—The suit arose after the Workmen's Compensation Commission (the Commission) repeatedly, but unsuccessfully, charged the PCIGC for claims PCIGC paid on behalf of insolvent insurers—claims that otherwise would have been subject to SIF and UEF assessments.<sup>22</sup> PCIGC protested, arguing that the assessments were taxes within the meaning of its statutory tax exemption.<sup>23</sup> PCIGC filed a complaint in the Circuit Court for Baltimore County seeking a declaratory judgment exempting it from paying the

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pensation law provides a schedule of worker's compensation awards based on the nature and extent of a worker's injuries. *See id.* § 36.

18. *See id.* § 66(1). The section provides in part:

Whenever an employee who has a permanent impairment due to previous accident or disease or any congenital condition, which is or is likely to be a hindrance or obstacle to his employment, incurs subsequent disability by reason of a personal injury, for which compensation is required by this article resulting in permanent partial or permanent total disability that is substantially greater by reason of the combined effects of the impairment and subsequent injury than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall be liable only for the compensation payable under this article for such injury. However, in addition to such compensation to which the employer or his insurance carrier is liable . . . the employee shall be entitled to receive and shall be paid additional compensation from a special fund to be known as the "Subsequent Injury Fund," . . . it being the intent of this section to make the total payments to which such employee shall become entitled equal to the compensation that would be due for the combined effects of the impairment and subsequent injury resulting in permanent total disability or a substantially greater permanent partial disability . . .

*Id.*

19. *See id.* § 91(a) (articulating the UEF's purpose); *Uninsured Employer's Fund v. Hoy*, 23 Md. App. 1, 5, 325 A.2d 446, 449 (1974) (the UEF's purpose is to provide payment of awards against uninsured defaulting employers).

20. *See* MD. ANN. CODE art. 101, § 91(d)(4) (1985 & Supp. 1990); *infra* note 81 and accompanying text.

21. *See* MD. ANN. CODE art. 101, § 91(d)(4) (1985 & Supp. 1990).

22. *Property & Casualty Ins.*, 319 Md. at 4, 570 A.2d at 324.

23. *See id.*; *see also* MD. ANN. CODE art. 48A, § 515 (1986 & Supp. 1990) (quoted *supra* note 10).

assessments.<sup>24</sup>

The Baltimore County Circuit Court held that the assessments were taxes within the meaning of the statutory exemption, and granted PCIGC the relief it requested.<sup>25</sup> The Court of Special Appeals affirmed this decision.<sup>26</sup> The Court of Appeals granted the Commission's petition for certiorari and affirmed, holding that the assessments plainly fell within PCIGC's exemption from tax under article 48A, section 515.<sup>27</sup>

The Court of Appeals based its determination on several factors. First, the court looked to the definition of the statutory term "taxes" in other Maryland cases.<sup>28</sup> The court decided that the assessments fell within the definition, and noted that "the Legislature's use of the word 'assessment' in no way indicates that a governmental charge imposed for a public purpose is not a 'tax.'"<sup>29</sup> The court pointed out that the SIF and the UEF assessments are similar to other assessments that have been viewed as taxes,<sup>30</sup> including assessments to the Unsatisfied Claim and Judgment Fund<sup>31</sup> and employer contributions to unemployment compensation.<sup>32</sup> Furthermore, other jurisdictions have held that similar assessments

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24. *Property & Casualty Ins.*, 319 Md. at 4, 570 A.2d at 324.

25. *Id.* at 5, 570 A.2d at 324-25.

26. *See Workmen's Compensation Comm'n v. Property & Casualty Ins. Guar. Corp.*, 74 Md. App. 99, 105, 536 A.2d 714, 717 (1988), *aff'd*, 319 Md. 1, 570 A.2d 323 (1990).

27. *See Property & Casualty Ins.*, 319 Md. at 11, 570 A.2d at 327-28.

28. *See id.* at 5, 570 A.2d at 325; *see also Mayor of Baltimore v. Greenmount Cemetery*, 7 Md. 517, 535 (1855); *infra* notes 37-43 and accompanying text.

29. 319 Md. at 5, 570 A.2d at 325.

30. *See id.* at 6, 570 A.2d at 325.

31. *See id.* The Unsatisfied Claim and Judgment Fund compensated victims of automobile accidents in which the responsible party was uninsured. *See* MD. ANN. CODE art. 66-1/2, § 151 (1957) (repealed 1977). It was funded in part by assessments on automobile liability insurers determined as a percentage of premiums on liability policies. *See id.*; *see also Allied American Mut. Fire Ins. Co. v. Commissioner of Motor Vehicles*, 219 Md. 607, 616, 150 A.2d 421, 427 (1959) (assessments for the UCJF are a valid exercise of the State's taxing power); *State Ins. Comm'r v. Nationwide Mut. Ins. Co.*, 241 Md. 108, 116, 215 A.2d 749, 754 (1966) (UCJF assessments are similar in character to both "taxes" and "licenses"); *infra* notes 61-62 and accompanying text.

32. *See* 319 Md. at 6, 570 A.2d at 325-26. The Unemployment Compensation Act imposes upon employers an obligation to pay a percentage of their payrolls into the unemployment compensation fund. *See* MD. ANN. CODE art. 95A, § 8(b) (1985). *See also infra* note 63 and accompanying text; *see Standard Properties, Inc. v. Employment Sec. Bd. of Md.*, 201 Md. 1, 7, 92 A.2d 459, 462 (1952) (the unemployment compensation law is an exercise of the State's taxing power); *Maryland Unemployment Compensation Bd. v. Albrecht*, 183 Md. 87, 89, 36 A.2d 666, 667 (1944) (unemployment compensation contributions demanded from an employer are an excise tax imposed by the legislature in the exercise of the State's police power).

are taxes.<sup>33</sup>

Finally, the court rejected the Commission's argument that the SIF and UEF assessments are part of the "covered claims" PCIGC is statutorily obligated to pay under article 48A, section 508(a).<sup>34</sup> The court rejected the argument that the requirement that PCIGC pay "covered claims" conflicts with article 48A, section 515, which exempts PCIGC from paying taxes,<sup>35</sup> noting that this reading of the statutes would ignore section 515's clear intent.<sup>36</sup>

## 2. Legal Background.—

a. *Maryland.*—In *Mayor of Baltimore v. Greenmount Cemetery*,<sup>37</sup> the Court of Appeals construed broadly the term "taxes." The court considered whether assessments for street paving were taxes,<sup>38</sup> and defined "taxes" as "burdens, charges or impositions, put or set upon persons or property for public uses."<sup>39</sup> The court noted that use of the term "assessments" is not determinative:

The distinction, if any, between a *tax* and an *assessment* is not very palpable. The meaning of the words is the same in our laws. When a man is assessed to pay a certain sum, it is equivalent to, and nothing more than, the imposition of a tax on him to that amount.<sup>40</sup>

Subsequent cases cite with approval the *Greenmount Cemetery* def-

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33. See, e.g., *American Alliance Ins. Co. v. State Bd. of Equalization*, 134 Cal. App. 3d 601, 606-08, 184 Cal. Rptr. 674, 676-77 (1982) (assessments for a workers' compensation fund may be used in computing retaliatory tax returns); *Price v. All American Eng'g Co.*, 320 A.2d 336, 338 (Del. 1974) (referring to contributions to an Industrial Accident Board Second Injury and Contingency Fund as taxes); *Beth-Elkhorn Corp. v. Ross*, 552 S.W.2d 656, 657 (Ky. 1977) (referring to a maintenance fund and a special claim fund assessment as taxes); *Employers' Fire Ins. Co. v. Taxation Div. Dir.*, 5 N.J. Tax 326, 337 (1983), *aff'd*, 6 N.J. Tax 613 (N.J. Super. 1984) (assessments for a Second Injury Fund are an obligation sufficiently similar to taxes to be used in computing retaliatory tax returns); *Providence Washington Ins. Co. v. Pennsylvania Comm'r Dept. of Rev.*, 75 Pa. Commw. 463, 471-72, 463 A.2d 68, 72 (1983) (assessments for a workers' compensation fund are an obligation similar to taxes, and therefore may be used in computing retaliatory tax returns), *aff'd*, 504 Pa. 506, 475 A.2d 741 (1984).

34. See *Property & Casualty Ins.*, 319 Md. at 11, 570 A.2d at 327. The Commission argued that PCIGC must pay obligations that the insolvent insurer was required to pay on behalf of its insured under the policy's terms. See Petitioner's Brief at 8, *Property & Casualty Ins.*, 319 Md. 1, 570 A.2d 323 (1990) (No. 8831).

35. See *Property & Casualty Ins.*, 319 Md. at 10-11, 570 A.2d at 327-28.

36. See *id.* at 10, 570 A.2d at 327.

37. 7 Md. 517 (1855).

38. See *id.* at 533. The court found that the assessments for street paving were payments for benefits conferred on property owners rather than taxes. See *id.* at 536.

39. *Id.* at 535.

40. *Id.* (emphasis in original).



inition.<sup>41</sup> Others have joined the *Greenmount Cemetery* court in broadly defining the term. For example, in *Mayor of Baltimore v. Fine*,<sup>42</sup> the court defined "tax" as a "charge imposed upon the taxpayer as an act of sovereignty, without his consent, and for the public use."<sup>43</sup> Maryland courts have applied these broad definitions to assessments that are similar but not identical to the SIF and the UEF.<sup>44</sup>

*b. Other Jurisdictions.*—Other jurisdictions have determined that assessments similar to the SIF and the UEF assessments are taxes. Several of these cases specifically address funds nearly identical to the SIF. In *Price v. All American Engineering Co.*,<sup>45</sup> the Supreme Court of Delaware analyzed assessments for an "Industrial Accident Board Second Injury and Contingency Fund," and referred to these as taxes: "insurance carriers . . . will be *taxed* a sum not to exceed one half of one percent of all [workers'] compensation or employer liability premiums received by the carrier . . ."<sup>46</sup> Similarly, in *Employers' Fire Insurance Co. v. Taxation Division Director*,<sup>47</sup> the New Jersey Tax Court addressed the characterization of payments made to a "Second Injury Fund." The court held that the payments should be taken into account in computing retaliatory tax liability.<sup>48</sup> The court did not need to determine whether the payments were specifically "taxes," however, because the New Jersey statute only required

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41. *E.g.*, *Comptroller of the Treasury v. Russell*, 284 Md. 174, 178, 395 A.2d 488, 490 (1978) ("the word 'tax' means a burden, charge or imposition put or set upon a person or property for public uses").

42. 148 Md. 324, 129 A. 356 (1925).

43. *Id.* at 328, 129 A. at 358 (citing *Bonaparte v. State*, 63 Md. 465, 470-71 (1885)).

44. *See supra* notes 31-32 and accompanying text.

45. 320 A.2d 336 (Del. 1974).

46. *Id.* at 338 (emphasis added); *see* DEL. CODE ANN. tit. 19, § 2395 (1985 & Supp. 1990).

47. 5 N.J. Tax 326 (1983), *aff'd*, 6 N.J. Tax 613 (N.J. Super. 1984).

48. *See id.* at 337; *see generally* N.J. STAT. ANN. § 17:32-15 (West 1985 & Supp. 1990). A "retaliatory law" refers to "[r]estraints placed by state law on foreign companies equal to the restraints placed by such foreign jurisdictions on companies doing business in such states." BLACK'S LAW DICTIONARY 1183 (5th ed. 1979). For example, Maryland's retaliatory tax statute provides that when a foreign state's laws impose any tax or other obligation on Maryland insurance companies doing business in that state, Maryland imposes the same taxes and obligations on insurance companies from that state doing business here. *See* MD. ANN. CODE art. 48A, § 61 (1986 & Supp. 1990). The majority of states have enacted retaliatory tax laws "to promote the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes." *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 668 (1981).

For a discussion of the steps taken in calculating the retaliatory tax due, *see* *State Ins. Comm'r v. Nationwide Mut. Ins. Co.*, 241 Md. 108, 111, 215 A.2d 749, 751 (1966).

that they be sufficiently like a tax so as to constitute "other obligations."<sup>49</sup>

In *American Alliance Insurance Co. v. State Board of Equalization*,<sup>50</sup> the California Court of Appeals also addressed characterizing assessments as "taxes" for purposes of retaliatory tax calculations.<sup>51</sup> The assessment in question was an Arizona premium tax on workers' compensation insurers that Arizona earmarked for an administrative fund.<sup>52</sup> The court stated that "[t]he distinction between taxes and assessments is clear. Taxes are imposed for the general public good. On the contrary, assessments are levied for benefits conferred."<sup>53</sup> Thus, the court held that this premium tax was not a special purpose obligation or assessment because it was not a charge for benefits conferred.<sup>54</sup>

### 3. Analysis.—

a. *Assessments as Taxes.*—The primary issue in *Property & Casualty Insurance* was the statutory construction of article 48A, section 515: whether the SIF and the UEF assessments are "taxes" within the meaning of PCIGC's statutory exemption from tax payment.<sup>55</sup> The court's analysis of this issue consisted of three parts. First, the court looked at how Maryland courts have defined "taxes," and found that the SIF and the UEF assessments appropriately fit the definition.<sup>56</sup>

They are involuntary charges imposed by the State upon insurers and employers . . . . The benefit of the general public is served by both of these funds because the burden of the circumstances they are intended to relieve would otherwise be shouldered in part by the general public. Accordingly, the assessment proceeds which fund the SIF and the UEF constitute government revenue raised by legally required payments to be expended for public purposes. As such, they are "taxes."<sup>57</sup>

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49. 5 N.J. Tax at 336.

50. 134 Cal. App. 3d 601, 184 Cal. Rptr. 674 (1982).

51. See *id.* at 605-06, 184 Cal. Rptr. at 675-76.

52. See *id.* at 606, 184 Cal. Rptr. at 676.

53. *Id.*

54. See *id.* at 607, 184 Cal. Rptr. at 676-77. California's constitution and retaliatory tax statute specifically exclude special purpose obligations or assessments. See CAL. CONST. art. XIII, § 28(f)(3); CAL. INS. CODE § 685.1 (West 1972 & Supp. 1991).

55. See 319 Md. at 2, 570 A.2d at 323.

56. *Id.* at 5-6, 570 A.2d at 325. For a discussion of previous Maryland cases that have defined "taxes," see *supra* notes 37-43 and accompanying text.

57. 319 Md. at 6, 570 A.2d at 325.

Consistent with prior Maryland case law, the court invoked what amounted to a three part test to determine whether the charges fit the definition of a "tax": is the assessment (1) an involuntary charge, (2) made by the State, and (3) intended to raise revenue for public purposes?<sup>58</sup> The SIF and the UEF assessments are involuntary, as evidenced by PCIGC's attempts to avoid payment. The State makes the assessments, because the Workmen's Compensation Commission is a creation of the State. Finally, the assessments are expended for "public purposes." Therefore, the court properly characterized these assessments as "taxes."<sup>59</sup>

Second, the court compared the SIF and the UEF assessments to other assessments that Maryland courts have viewed as taxes.<sup>60</sup> The court cited cases concerning the Unsatisfied Claim and Judgment Fund (UCJF), which assessed insurers a percentage of automobile premiums in order to indemnify innocent victims of uninsured motorists.<sup>61</sup> The two UCJF cases that the court cited in *Property & Casualty Insurance*, however, furnish only general support for the proposition that assessments are taxes, because neither explicitly calls UCJF assessments a "tax."<sup>62</sup>

The court also cited cases in which employer contributions to unemployment compensation funds were more definitively termed "taxes."<sup>63</sup> In those cases, however, the court emphasized that contributions to unemployment compensation funds are a lawful exercise of the State's police power, given the strong public policy of protecting citizens and the public from the hazards of unemployment.<sup>64</sup> The court did not need to make a distinction between taxes

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58. See *id.* Compare the definition of "tax" in *Mayor of Baltimore v. Greenmount Cemetery*, 7 Md. 517, 535 (1855) with that in *Mayor of Baltimore v. Fine*, 148 Md. 324, 328, 129 A. 356, 358 (1925).

59. See 319 Md. at 6, 570 A.2d at 325.

60. See *id.*

61. See *id.*; *supra* note 31.

62. One case asserted that UCJF assessments are within the state's taxing power, and thus implicitly labeled them as taxes. See *Allied American Mut. Fire Ins. Co. v. Commissioner of Motor Vehicles*, 219 Md. 607, 616, 150 A.2d 421, 427 (1959). The other case called the UCJF assessments "similar in character to both 'taxes' and 'licenses.'" See *State Ins. Comm'r v. Nationwide Mut. Ins. Co.*, 241 Md. 108, 116, 215 A.2d 749, 754 (1966).

63. Both cases refer to the unemployment compensation contribution as an "excise tax." See *Standard Properties, Inc. v. Employment Sec. Bd. of Md.*, 201 Md. 1, 7, 92 A.2d 459, 462 (1952); *Maryland Unemployment Compensation Bd. v. Albrecht*, 183 Md. 87, 89, 36 A.2d 666, 667 (1944).

64. See *Standard Properties*, 201 Md. at 7, 92 A.2d at 462; *Albrecht*, 183 Md. at 89, 36 A.2d at 667.

and assessments in either case; both taxes and assessments are within the State's police power.

The court also turned to other jurisdictions to support its holding,<sup>65</sup> and noted that several states characterize as "taxes" assessments for funds substantially similar to the SIF.<sup>66</sup> The cases cited by the court can be distinguished, however, because none addressed this classification with respect to an entity such as PCIGC.<sup>67</sup>

*b. Assessments as Covered Claims.*—The court rejected the Commission's argument that the SIF and the UEF were part of the "covered claims" that PCIGC is required by statute to pay.<sup>68</sup> The court noted that the statute specifically distinguished assessments from workers' compensation awards,<sup>69</sup> and concluded that assessments are not part of "overall workers' compensation."<sup>70</sup> The court also disagreed with the Commission's argument that the assessments "[a]rise out of the insurance policy contracts of the insolvent insurer,"<sup>71</sup> and instead asserted that they are wholly creatures of statute.<sup>72</sup>

In arriving at this conclusion, however, the Court of Appeals avoided addressing an important distinction. The SIF and the UEF assessments are an employer's obligation unless the employer is insured, in which case they are the insurance company's obligation.<sup>73</sup> When an employer contracts for insurance and when insurance companies establish premiums, both parties presumably consider SIF and UEF assessment payments as part of the contracted-for benefits.<sup>74</sup> As such, they arguably are part of covered claims that arise out of a workers' compensation policy.<sup>75</sup> The court should have in-

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65. See *Property & Casualty Ins.*, 319 Md. at 8, 570 A.2d at 326.

66. See *id.* (citing sources listed *supra* note 33).

67. Several of the other jurisdictions addressing the characterization of assessments similar to the SIF and the UEF have done so in the context of determining retaliatory tax liability. See *supra* note 33 and notes 45-54 and accompanying text.

68. See *Property & Casualty Ins.*, 319 Md. at 10, 570 A.2d at 327; see also MD. ANN. CODE art. 48A, § 504 (1986 & Supp. 1990).

69. See 319 Md. at 10, 570 A.2d at 27; MD. ANN. CODE art. 101, §§ 62(c)(2), 91(d)(3)(iii) (1986 & Supp. 1990).

70. 319 Md. at 10, 570 A.2d at 327 (quoting Petitioner's Brief, *supra* note 34, at 4-5).

71. *Id.* at 9, 570 A.2d at 327.

72. See *id.* at 10, 570 A.2d at 327.

73. See MD. ANN. CODE art. 101, §§ 66(2)(a), 91(d)(3)(i) (1985 & Supp. 1990).

74. See Petitioner's Brief, *supra* note 34, at 6-7.

75. See MD. ANN. CODE art. 48A, § 505(c)(1) (1986 & Supp. 1990), which provides: "Covered claims" means obligations, including unearned premiums, of an insolvent insurer which:

(i) 1. Arise out of the insurance policy contracts of the insolvent insurer issued

voked the rules of statutory construction to determine which of the two conflicting statutes is controlling.

The court's decision in *Property & Casualty Insurance* has limited implications because PCIGC is the only entity of its type in Maryland; PCIGC is the only corporation established by the General Assembly to pay claims against insolvent insurers, including, but not limited to, workers' compensation insurers. Also, the decision's effect upon state income tax revenue will be minimal, because private insurance companies may deduct the SIF and the UEF assessments regardless of whether they are characterized as "taxes."<sup>76</sup> Finally, because the legislature has excluded from retaliatory tax calculations "special purpose obligations or assessments imposed by another state in connection with particular kinds of insurance,"<sup>77</sup> the *Property & Casualty Insurance* decision does not allow out-of-state insurance companies licensed to do business in Maryland to obtain a retaliatory tax credit for payments made to the SIF and the UEF.<sup>78</sup>

Although the court held that PCIGC is exempt because assessments are taxes,<sup>79</sup> it did not address who will contribute to the SIF and the UEF the assessments that PCIGC does not have to pay.<sup>80</sup> Absent future legislation to the contrary, solvent employers and insurance companies probably will not have to pay additional amounts because assessments are calculated as a percentage of awards rendered against individual employers or insurers, not as a function of total compensation paid out by the funds.<sup>81</sup>

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to residents of this State or which are payable to residents of this State on behalf of insureds of the insolvent insurer. . . .

*Id.* (emphasis in original). See Petitioner's Brief, *supra* note 34, at 8.

76. See I.R.C. § 832(c)(1) (West 1990) (allowing insurance companies a deduction from income for both ordinary business expenses and taxes); see also *id.* § 162(a) (discussing deductible ordinary and necessary business expenses); *id.* § 164(a) (discussing deductible taxes).

77. MD. ANN. CODE art. 48A, § 61(2) (1985 & Supp. 1990) (providing for exceptions to the Retaliatory Tax Law).

78. See, e.g., *Employers' Fire Ins. Co. v. Taxation Div. Dir.*, 5 N.J. Tax 326, 337 (1983), *aff'd*, 6 N.J. Tax 613 (N.J. Super. 1984).

79. See *Property & Casualty Ins.*, 319 Md. at 11, 570 A.2d at 328.

80. *But see infra* note 84.

81. See *supra* notes 12-13 and accompanying text. Nevertheless, the UEF has a statutory provision that discontinues the assessments when the fund reaches \$2,500,000, and resumes them when the fund drops below \$1,000,000. See MD. ANN. CODE art. 101, § 91(d)(4) (1985 & Supp. 1990). If PCIGC were required to pay the UEF assessments, it would be easier to reach the \$2,500,000 limit in a given year. Therefore, without PCIGC's contributions, a burden might in fact fall on employers if they are forced to pay UEF assessments on more awards than they otherwise would. The SIF's cap and floor provisions were repealed in 1987. See MD. ANN. CODE art. 48A, § 66(4) (1986) (repealed 1987).

Also, PCIGC is funded by its member insurers<sup>82</sup> and is empowered to "assess member insurers . . . in amounts necessary to pay the obligation of [PCIGC]." <sup>83</sup> This assessment allows PCIGC to meet its obligations; but with fewer obligations, insurance companies should reap the benefits of lower assessments.

The solution to the possible problem of an SIF and UEF funding shortfall lies with the state legislature.<sup>84</sup> If the problem arises and the legislature chooses to act, it presumably will either increase the percentages that private insurers pay to SIF and UEF, or negate the court's ruling by requiring PCIGC to pay the assessments. In either case, assuming that most employers maintain workers' compensation insurance, the ultimate burden will fall on the solvent insurance companies either through higher SIF and UEF assessments, or through higher payments to PCIGC when PCIGC passes its costs on to its members.

The legislature's choice will also have an effect on self-insured employers because they do not fund the PCIGC.<sup>85</sup> If the legislature increases SIF and UEF percentages, self-insured employers will be hurt because they will have to pay higher SIF and UEF assessments, but will not benefit from reduced PCIGC assessments.

4. *Conclusion.*—The Court of Appeals' decision in *Property & Casualty Insurance* considers a new issue, PCIGC's statutory exemption from paying taxes, in light of prior Maryland law.<sup>86</sup> It brings Maryland into line with other states that have considered the same or substantially similar issues relating to the characterization of assessments as "taxes." Absent legislative action, solvent insurance

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82. See MD. ANN. CODE art. 48A, § 508(a)(3) (1986).

83. *Id.* (1986 & Supp. 1990). Note that a "member insurer" is any insurer that "(i) [w]rites any kind of insurance to which this subtitle applies. . . ; and (ii) [i]s licensed to transact insurance in this State." *Id.* § 505(e)(1). PCIGC divides claims paid and expenses incurred into four accounts—title insurance, motor vehicle insurance, workmen's compensation, and all other applicable types of insurance, see *id.* § 506(d), and it assesses member insurers separately for each account based on the amount of premiums the member insurer collects for that type of insurance. See *id.* § 508(a)(3). Therefore, a decrease in claims paid and expenses incurred in the workers' compensation account will directly benefit workers' compensation insurers.

84. The Court of Special Appeals did not address the issue of who would pay the assessments if PCIGC did not do so because the issue was not raised before the trial court. See *Workmen's Compensation Comm'n v. Property & Casualty Ins. Guar. Corp.*, 74 Md. App. 99, 106, 536 A.2d 714, 717-18 (1988), *aff'd*, 319 Md. 1, 570 A.2d 323 (1990). The Court of Special Appeals noted that the issue's resolution should be left to the General Assembly. See *id.*

85. See *supra* note 73 and accompanying text.

86. See *supra* text accompanying notes 37-44.

companies that provide PCIGC's funding may receive a windfall.<sup>87</sup>

The court's opinion may have limited precedential effect on future Maryland case law because the issue is narrow and fact specific: PCIGC is the only entity established by the General Assembly to pay insolvent insurers' claims. On the other hand, legislative action may be necessary to keep the SIF and the UEF adequately funded, and the legislature could create other entities similar to the PCIGC. The legislature's choice of action undoubtedly will affect insurance companies and self-insured employers doing business in Maryland.

LAURA L. HENNINGER

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87. See *supra* notes 82-83 and accompanying text.

## XII. TORTS

### A. Vicarious Liability of Franchisors

In *Chevron, U.S.A., Inc. v. Lesch*,<sup>1</sup> the Court of Appeals ruled that Chevron could not be held vicariously liable under a theory of apparent agency for a negligent auto repair performed at a Chevron-branded service station.<sup>2</sup> The court found the plaintiffs' belief that the service station operator was a Chevron employee was unjustified by the facts and unreasonable as a matter of law.<sup>3</sup> The court also held that the defendant, Bay Oil Inc., an independent jobber<sup>4</sup> and lessor of the service station, did not possess or exercise sufficient control over the service station operator to establish vicarious liability on actual agency grounds.<sup>5</sup>

Oil company liability for the wrongful acts of service station operators has received considerable attention in the courts and among legal commentators.<sup>6</sup> The problem's difficulty arises from the nature of the distribution system employed by the major oil companies, and the business relationships between oil companies and service station operators.<sup>7</sup> Judicial attempts to analyze these rela-

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1. 319 Md. 25, 570 A.2d 840 (1990).

2. See *id.* at 35, 570 A.2d at 845. A "branded station" displays a particular brand's signs and colors, and sells only that brand of gasoline and oil. *Id.* at 27, 570 A.2d at 841.

3. See *id.* at 35, 570 A.2d at 845.

4. A "jobber" is an individual or corporation who purchases from a wholesaler gasoline products for resale to a dealer. MD. COM. LAW CODE ANN. § 11-301(h) (1983).

5. See 319 Md. at 33, 570 A.2d at 844 (1990).

6. See generally Comment, *Service Station Torts: Time for the Oil Companies to Assume Their Share of the Responsibility*, 10 CAL. W.L. REV. 382 (1974) [hereinafter *Service Station Torts*] (analyzing liability theories developed by the courts, and offering alternatives); Comment, *Liability of Oil Companies for Torts of Service Station Operators*, 7 LAND & WATER L. REV. 263 (1972) [hereinafter *Liability of Oil Companies*] (same); Comment, *Liability of Oil Company for Its Lessee's Torts*, 1965 U. ILL. L.F. 915 (1965) (oil companies should be liable for service station torts because they are better able to pay judgments); Comment, *Vicarious Liability of Filling Station Oil Companies Under Respondeat Superior*, 3 WASHBURN L.J. 88 (1964) (traditional agency law is an inappropriate basis for determining oil company liability); Note, *You Can Trust Your Car to the Man Who Wears the Star—Or Can You?: The Use of Apparent Authority to Establish a Principal's Tort Liability*, 33 U. PITT. L. REV. 257 (1971) (discussing the role of advertising in creating an agency relationship between oil companies and their franchisee service stations); Annotation, *Status of Gasoline and Oil Distributor or Dealer as Agent, Employee, Independent Contractor, or Independent Dealer as Regards Responsibility for Injury to Person or Damage to Property*, 83 A.L.R.2d 1282 (1962 & Supp. 1990) (surveying the relevant cases).

7. These relationships generally fall into three categories: (1) company-operated stations, in which the oil company owns or leases the station and the oil company pays employees on a salary basis; (2) dealer-operated stations, in which the company owns or leases the station and rents it along with the necessary equipment to the dealer; and (3)



tionships using established theories of agency liability have produced unpredictable and sometimes inconsistent results.<sup>8</sup>

The conflicting opinions of the Court of Appeals and the Court of Special Appeals in *Lesch* illustrate the deficiencies of common law agency principles as applied to franchisor-franchisee relationships.<sup>9</sup> The two courts applied the same law to the same facts, but reached entirely different results. The Court of Appeals interpreted the facts and selected precedents so as to reaffirm a narrow construction of the limits of oil company vicarious liability in the service station context.

1. *The Case*.—On July 14, 1985, Dr. Warren Lesch noticed that his automobile's gas tank was leaking.<sup>10</sup> The following day, Dr. Lesch had the car towed to Walker's Chevron Inc. (Walker's Chevron), where mechanic Malcolm Weeks "fixed" the leak.<sup>11</sup> On July 16, 1985, Dr. Lesch retrieved the car, and checked the fuel tank several times throughout the day.<sup>12</sup> He observed no leaking and

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"contractor" stations, in which the station operator owns or leases the station and simply has a supply contract with the oil company. In the first category the oil company clearly is liable for the operator's tortious acts; the question of oil company vicarious liability arises in the last two categories. See Comment, *Liability of Oil Companies*, *supra* note 6, at 265.

Maryland law prohibits petroleum product refiners and producers from operating retail service stations. MD. ANN. CODE art. 56, § 157E (1988). In response to the 1973 petroleum shortage, this "Divestiture Act" was designed to prevent inequitable petroleum distribution and pricing among retail stations. See *Lesch v. Chevron, U.S.A., Inc.*, 75 Md. App. 669, 692-95, 542 A.2d 1292, 1304-05 (1988) (Divestiture Act does not insulate oil companies from liability for wrongful acts of apparent agents).

8. See, e.g., Comment, *Liability of Oil Companies*, *supra* note 6, at 267-68 (surveying cases and concluding that the presence of no single fact or combination of facts determines the oil company's liability or nonliability).

9. Service station cases are only one part of the broader topic of franchisor liability for a franchisee's torts. See generally Brown, *Franchising—A Fiduciary Relationship*, 49 TEX. L. REV. 650 (1971) (the law should require franchisors to promote franchise economic interests); Comment, *Theories of Liability for Retail Franchisors: A Theme and Four Variations*, 39 MD. L. REV. 264 (1979) [hereinafter *Theories of Liability*] (comparing various theories of franchisor liability); Comment, *Franchisor's Liability for the Torts of His Franchisee*, 5 U.S.F. L. REV. 118 (1970) (comparing theories of franchisor liability); Comment, *Dealer Franchising in the Gasoline Industry: Current Developments*, 4 U.S.F. L. REV. 65, (1969) (discussing the development of service station franchising and its relationship to antitrust law); Annotation, *Vicarious Liability of Private Franchisor*, A.L.R.3d 764 (1977) (surveying the relevant cases).

10. *Lesch*, 319 Md. at 28, 570 A.2d at 842. The tank probably was punctured earlier that day when Dr. Lesch inadvertently drove over a metal rod lying in the roadway. *Id.*

11. *Id.* Weeks apparently attempted to repair the leak by pressing air conditioning duct tape into or over the hole and inserting a screw into it. He then sealed the area with a multi-purpose epoxy, filled the tank, and checked it for leaks.

12. *Id.* at 29, 570 A.2d at 842.

parked the car in his garage for the night.

The following morning, Dr. Lesch and his wife noticed a gasoline odor in their house.<sup>13</sup> They walked downstairs to the garage, where Dr. Lesch observed a "little puddling" of gasoline underneath the car.<sup>14</sup> As Dr. Lesch manually raised the garage door, it triggered an electric light, causing an instantaneous explosion.<sup>15</sup> The Lesches were severely burned, and the ensuing fire destroyed their house and all of its contents.<sup>16</sup>

Alleging that Weeks' negligence caused the explosion, the Lesches filed suit against Weeks, Walker's Chevron, Bay Oil, Inc. (Bay Oil), and Chevron U.S.A., Inc. (Chevron).<sup>17</sup> Walker's Chevron owned and operated the service station business. Bay Oil leased the premises to Walker's Chevron, and supplied it gasoline and other Chevron products.<sup>18</sup>

The Lesches' claim against Bay Oil was based on a theory of actual agency—that Walker's Chevron and its employees were servants of Bay Oil and subject-in-fact to its control.<sup>19</sup> As for Chevron U.S.A., the Lesches did not contend that an actual master-servant relationship existed. Rather, their claim was based on a theory of apparent agency, or agency by estoppel.<sup>20</sup> The trial judge granted motions for summary judgment in favor of both Bay Oil and Chevron.<sup>21</sup> The Court of Special Appeals reversed, finding that the evidence relating to both claims presented issues for determination by the trier of facts.<sup>22</sup> On certiorari, the Court of Appeals reinstated the judgments in favor of Bay Oil and Chevron.<sup>23</sup>

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13. *Id.*

14. *Lesch v. Chevron, U.S.A., Inc.*, 75 Md. App. 669, 674, 542 A.2d 1292, 1294 (1988). Dr. Lesch said that because he smelled gasoline, he was careful not to turn on any lights or to activate the electric garage door opener. *Lesch*, 319 Md. at 29, 570 A.2d at 842.

15. *Lesch*, 319 Md. at 29, 570 A.2d at 842.

16. *Id.*

17. *Id.* at 27, 570 A.2d at 841.

18. *Id.*

19. *See id.* *See infra* notes 24-32 and accompanying text.

20. *See Lesch*, 319 Md. at 27, 570 A.2d at 841. *See infra* notes 33-46 and accompanying text.

21. *Lesch*, 319 Md. at 28, 570 A.2d at 841.

22. *See Lesch v. Chevron, U.S.A., Inc.*, 75 Md. App. 669, 694-95, 700, 542 A.2d 1292, 1305, 1307 (1988).

23. *See Lesch*, 319 Md. at 44, 570 A.2d at 850.

## 2. *Legal Background.*—

a. *Actual Agency: The Control Test.*—According to the principle of respondeat superior, a master is vicariously liable for torts committed by his servant acting within the scope of employment.<sup>24</sup> As a general rule, an employer is not liable when the tortfeasor is an independent contractor.<sup>25</sup> The test in Maryland for determining whether a master and servant relationship exists is whether the employer has “the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done.”<sup>26</sup>

In service station tort cases, courts in most jurisdictions first examine lease provisions and dealer agreements for evidence of control.<sup>27</sup> Although no single factor has been held determinative, provisions usually considered include those relating to payment arrangements, termination, required hours of operation, exclusive sale of company products, actual ownership of the outlet and equipment, and the franchisor's rights to perform inspections of the outlet and make suggestions regarding its operation.<sup>28</sup> Contractual provisions describing the franchisee as an independent contractor usually are held not controlling, although they may assist in determining the contracting parties' intent.<sup>29</sup>

Because no single fact or combination of facts controls the classification of a service station operator as either an independent contractor or a servant, many commentators argue that the cases cannot be synthesized.<sup>30</sup> In most reported decisions, however, courts have

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24. See RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

25. See RESTATEMENT (SECOND) OF TORTS § 40 (1965).

26. *Keitz v. National Paving Co.*, 214 Md. 479, 491, 134 A.2d 296, 301 (1977) (factual question existed as to whether paving contractor had unlimited right to control and direct truck driver in the performance of contractor's work). *Accord* *Brady v. Ralph Parsons Co.*, 308 Md. 486, 510, 520 A.2d 717, 730 (1987); *Mackall v. Zayre Corp.*, 293 Md. 221, 230, 443 A.2d 98, 103 (1982). Courts have formulated a variety of tests for determining whether a master-servant relationship exists in the franchisor/franchisee context. See Comment, *Theories of Liability*, *supra* note 9, at 268 n.23. Although the differences are largely semantic, courts, such as the Maryland courts, using the “right to control” test, tend to look only to the franchise agreement for evidence of control. *Id.*

27. Comment, *Service Station Torts*, *supra* note 6, at 384. Courts also may look to the circumstances or the parties' conduct to see if the relationship is other than that indicated by the written agreements. *Id.*

28. Comment, *Theories of Liability*, *supra* note 9, at 268-69; see also Comment, *Service Station Torts*, *supra* note 6, at 384-87 (surveying some of the results courts have reached under various facts).

29. See, e.g., *Lesch*, 319 Md. at 31, 570 A.2d at 843.

30. See, e.g., Comment, *Liability of Oil Companies*, *supra* note 6, at 269 (suggesting that in light of the “almost complete lack of correspondence between sets of facts and the

found that the only reasonable inference is that the operator is the oil company's independent contractor.<sup>31</sup> Thus, the issue is resolved as a question of law, and the plaintiff is precluded from obtaining a jury resolution of the case.<sup>32</sup>

b. *Apparent Agency or Agency by Estoppel.*—As an alternative to the master-servant theory, plaintiffs may assert a theory of apparent agency, or agency by estoppel.<sup>33</sup> In the 1977 case of *B.P. Oil Corp. v. Mabe*,<sup>34</sup> the Court of Appeals endorsed section 267 of the *Second Restatement of Agency*,<sup>35</sup> which provides as follows:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.<sup>36</sup>

Plaintiffs across the country have advanced the agency-by-estoppel theory in service station tort cases, beginning as early as 1939.<sup>37</sup> The oil company is alleged to hold the operator out as its agent through its signs, uniforms, credit cards, and advertising.<sup>38</sup> If the consumer reasonably relies on such representations of authority and is injured, vicarious liability for the operator's acts is imposed on the oil company.<sup>39</sup> Using the control test, most courts have decided the apparent agency issue as a matter of law.<sup>40</sup> These decisions generally conclude that the plaintiff's reliance on oil company

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results of these cases," courts stress the control factor according to their predilection for or against allowing recovery).

31. See Comment, *Service Station Torts*, *supra* note 6, at 384 ("most courts have become so stagnated in their application of the factually-complex control test that they are unwilling to hold the companies liable").

32. See *id.* Conversely, if the facts are susceptible to more than one inference, the issue is regarded as a question of fact to be determined by the jury. *Id.*

33. There is a narrow distinction between apparent agency, based on contract law, and agency by estoppel, based on tort law. See RESTATEMENT (SECOND) OF AGENCY §§ 8, 8B, comments & comment d to § 8 (1958). Nevertheless, courts tend to blend them into a single test. See *Lesch*, 319 Md. at 34 n.4, 570 A.2d at 845 n.4.

34. 279 Md. 632, 370 A.2d 554 (1955).

35. See *id.* at 643, 370 A.2d at 560-61.

36. RESTATEMENT (SECOND) OF AGENCY § 267 (1958). Maryland first recognized a form of the agency by estoppel theory in 1919. See *Pugh v. Washington Ry. & Elec.*, 134 Md. 196, 106 A. 522 (1919) (permitting an injured passenger to recover from a common carrier on a theory of agency by estoppel).

37. *E.g.*, *Reynolds v. Skelly Oil Co.*, 227 Iowa 163, 287 N.W. 823 (1939).

38. See Comment, *Service Station Torts*, *supra* note 6, at 391.

39. *Id.*

40. *Id.*

representations was unreasonable because it is "common knowledge" that service stations are merely independent sellers of the company's products.<sup>41</sup>

The 1971 case of *Gizzi v. Texaco, Inc.*<sup>42</sup> was one of the first reported decisions in which an apparent agency question was allowed to go to the jury.<sup>43</sup> The plaintiff in *Gizzi* alleged that he relied on Texaco's representations that it stood behind the repair and sale of a used Volkswagen bus purchased from a Texaco dealer.<sup>44</sup> A decisive factor was the company's national advertising campaign, particularly the slogan, "You Can Trust Your Car to the Man Who Wears the Star."<sup>45</sup> But the *Gizzi* decision did not start a strong trend toward increased oil company liability: the majority of cases since *Gizzi* have continued to apply the "common knowledge" rule.<sup>46</sup>

c. *The Law in Maryland.*—*B.P. Oil Corp. v. Mabe*<sup>47</sup> is the only service station case of this type arising in Maryland prior to *Lesch*. In *Mabe*, the plaintiff was injured when a filling station attendant inadvertently filled his radiator with gasoline, causing an explosion.<sup>48</sup> The Court of Appeals held that the plaintiff failed to establish either actual agency or agency by estoppel.<sup>49</sup> Addressing first the issue of actual agency, the court ruled that based on the facts of the case, particularly the written lease agreement's provisions,<sup>50</sup> the evidence did not warrant a finding that British Petroleum (BP) controlled the

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41. See, e.g., *Reynolds*, 227 Iowa at 171, 287 N.W. at 827 (applying the "common knowledge" rule to reject the plaintiff's agency by estoppel claim); *Lesch*, 319 Md. at 37, 570 A.2d at 846 (noting other cases that have applied the "common knowledge" rule).

42. 437 F.2d 308 (3d Cir.), cert. denied, 404 U.S. 829 (1971).

43. See *id.* at 310. Cf. *Standard Oil Co. v. Gentry*, 241 Ala. 62, 65, 1 So. 2d 29, 31 (1941) (the defendant operated the station until three-and-a-half months before the incident giving rise to the suit, creating for the jury an agency by estoppel issue).

44. See 437 F.2d at 309. As a term of the sale, the station operator agreed to replace part of the vehicle's braking system, and test it for reliability. The brakes subsequently failed, injuring *Gizzi* and his passenger. *Id.*

45. *Id.* at 310. The *Second Restatement of Agency* recognizes that manifestations such as signs and advertising may imply to the community that an agency relationship exists. RESTATEMENT (SECOND) OF AGENCY § 8 (1958).

46. See generally Annotation, *supra* note 6, at 1291 (cataloguing cases decided in favor of plaintiffs and defendant service stations). See also *Green v. Shell Oil Co.*, 181 Mich. App. 439, 446, 450 N.W.2d 50, 53 (1989) (factual question raised as to the existence of agency by estoppel; no mention of the "common knowledge" rule).

47. 279 Md. 632, 370 A.2d 554 (1977).

48. *Id.* at 634, 370 A.2d at 556.

49. See *id.* at 649, 370 A.2d at 564.

50. The service station operator leased the station building to BP, which in turn leased it back to the operator. *Id.* at 634, 370 A.2d at 556.

station's operation.<sup>51</sup>

Turning next to the apparent agency claim, the court found that the plaintiff had "fallen far short" of establishing the necessary element of reliance.<sup>52</sup> The court declared:

[t]he statement of [the plaintiff] that his reason for choosing the station in question was that he "always buy[s] BP gasoline, always deal[s] with BP, [was] but little different from a statement that one always buys a particular make of shoes, wears clothes with a certain label, drives an automobile produced by a certain manufacturer, eats a certain brand of breakfast cereal, or smokes a certain kind of cigarette."<sup>53</sup>

In an apparent acknowledgment of *Gizzi*, the court noted that no evidence had been introduced as to any of BP's advertising.<sup>54</sup>

*d. Bases of the Lesch Decision.—(i). Actual Agency.*—The Lesches based their claim against Bay Oil on an actual agency theory: that Walker's Chevron and its employees were Bay Oil's servants, subject-in-fact to its control.<sup>55</sup> There were two written agreements between Bay Oil and Walker's Chevron: a reseller's contract and a lease agreement.<sup>56</sup> Both documents included provisions characterizing Walker as an independent contractor and denying Bay Oil "any right to exercise any control" over the operation of Walker's Chevron.<sup>57</sup>

The key evidence supporting the Lesches' claim of actual agency was a letter from Bay Oil to Walker dated December 16, 1982.<sup>58</sup> The letter cited "certain problems regarding the operation of [the] service station," and imposed conditions with which Walker was expected to comply if he wished to continue to occupy the

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51. See *id.* at 643, 370 A.2d at 560. The court quoted *Westre v. De Buhr & Sinclair Ref. Co.*, 82 S.D. 276, 278-79, 144 N.W.2d 734, 735 (1966), which held, based on substantially similar facts, that "[s]imilar types of clauses are found in many leases. None of these indicate the type of control sufficient to establish anything but a landlord-tenant relationship." *Id.* at 642, 370 A.2d at 560.

52. *Mabe*, 279 Md. at 647, 370 A.2d at 563.

53. *Id.* at 649, 370 A.2d at 564.

54. See *id.* The *Mabe* court seems to have required a specific advertising campaign along the lines of the one in *Gizzi*. Comment, *Theories of Liability*, *supra* note 9, at 282 n.94.

55. See *Lesch*, 319 Md. at 27, 570 A.2d at 841.

56. See *id.* at 30-31, 570 A.2d at 843.

57. *Id.*, 570 A.2d at 843. See *supra* notes 27-29 and accompanying text.

58. See *id.* at 31, 570 A.2d at 843.

premises.<sup>59</sup> The Court of Special Appeals characterized this letter as an "ultimatum," and found that it constituted sufficient evidence of Bay Oil's power to control the conduct of Walker's Chevron to permit a trier of fact to find a master-servant relationship.<sup>60</sup>

The Court of Appeals reversed, stating that such provisions are customary in lease agreements, and that the letter merely "announced the change in terms as a condition to the continuation of the [month-to-month] lease."<sup>61</sup> The court held that these conditions, individually or collectively, did not demonstrate a claim to, or exercise of, the degree of control necessary to establish a master-servant relationship.<sup>62</sup>

(ii). *Apparent Agency.*—The Lesches also contended that Chevron caused them reasonably to believe that Weeks was its employee, and therefore had the skill one would expect of a major oil company's employee.<sup>63</sup> The Lesches alleged that because of their belief, they entrusted the repair work to Weeks and Walker's Chevron, and suffered damage as a result.<sup>64</sup>

In addition to the indicia of apparent authority typically relied upon in service station cases,<sup>65</sup> the Lesches pointed to Chevron

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59. *Id.* The letter set forth the following conditions:

1. The station will be kept clean and free of debris and trash at all times.
2. The station will be opened seven days per week no later than 7:00 a.m. and closed no earlier than 8:00 p.m.
3. The station will be properly lighted in a manner to give the appearance the station is open for business between sundown and 8:00 p.m.
4. All junk cars will be removed immediately, no more than three motor vehicles shall remain outside overnight and no automobile shall remain on the premises for more than one week.
5. You will be expected to furnish a deposit of \$700.00 as security for future payments of rent.
6. Gas will be paid for in full at the time of delivery.
7. Monthly rent will be calculated based on the previous month's sales according to the attached schedule.
8. We will bill you for rent at the beginning of each month. Your rent shall be due upon receipt of the bill.

*Id.* at 31-32, 570 A.2d at 843.

60. *Lesch v. Chevron, U.S.A., Inc.*, 75 Md. App. 669, 698-700, 542 A.2d 1292, 1306-07 (1988).

61. *Lesch*, 319 Md. at 33, 570 A.2d at 844. *B.P. Oil Corp. v. Mabe*, 279 Md. 632, 370 A.2d 554 (1977) followed this line of reasoning. See *supra* note 51 and accompanying text.

62. *Lesch*, 319 Md. at 33, 570 A.2d at 844.

63. See *id.* at 27, 570 A.2d at 841.

64. See *id.*

65. These included display of Chevron insignia and slogans throughout the service station, Chevron uniforms, Chevron-imprinted charge tickets, and a local yellow pages

company literature acknowledging that "[t]he public is often unable to distinguish between a jobber station and one of ours."<sup>66</sup> The Lesches also produced an internal memorandum revealing a company policy prohibiting Chevron-branded dealers from using "Chevron" in their incorporated names because this was misleading, and had unacceptable agency implications.<sup>67</sup> As early as February 1983, Chevron had actual knowledge that Walker's Chevron used "Chevron" in its corporate name, but did nothing to seek a change.<sup>68</sup>

Determining that the evidence was sufficient to allow a fact finding of apparent agency, the Court of Special Appeals held that the evidence established a reasonable inference that Chevron followed a course intended to make company operated and branded stations indistinguishable to the public.<sup>69</sup>

The Court of Appeals again disagreed, holding that any belief entertained by the Lesches that the employees of Walker's Chevron were employees of Chevron was not objectively reasonable.<sup>70</sup> In reaching this determination, the court relied upon the "common knowledge" rule, and quoted with approval from *Reynolds v. Skelly Oil Co.*,<sup>71</sup> where it appears to have originated:

The argument of appellee that the Skelly Oil Company was estopped because of the signs displayed and that, because of such signs, there was a presumption that the station was owned by the Skelly Oil Company has no support in reason or authority. [One may as] well argue, that because the word "Chevrolet" or "Buick" is displayed in front of a place of business, General Motors would be estopped to claim that it was not the owner of the business. It is a matter of common knowledge that these trademark signs are

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advertisement identifying the station as a Chevron service station. *Id.* at 36, 570 A.2d 845.

66. *Lesch v. Chevron, U.S.A., Inc.*, 75 Md. App. 669, 679, 542 A.2d 1292, 1297 (1988). This statement was excerpted from Chevron's "Station Acquisition Manual" of March 1984, in a section discussing the importance of consistently applying the Chevron retail identification system. *Id.*

67. *See id.* at 689-90, 542 A.2d at 1302. Despite the memo's explicit reference to the agency issue, the Court of Appeals characterized this policy as Chevron's effort to protect its trademark from infringement. *See* 319 Md. at 38-39, 570 A.2d at 847.

68. 75 Md. App. at 690, 542 A.2d at 1302-03.

69. *Id.* at 678, 542 A.2d at 1296 (emphasis in original).

70. *See* 319 Md. at 35, 570 A.2d at 845. The court assumed, without deciding, that summary judgment could not properly have been entered on the questions of whether the Lesches subjectively entertained such a belief, and whether they relied on that belief when entrusting the repair work to Walker's Chevron. *See id.*

71. 227 Iowa 163, 287 N.W. 823 (1939).



displayed throughout the country by independent dealers.<sup>72</sup>

The court conceded that one of the Lesches' arguments, "given slightly altered circumstances, might have proven persuasive."<sup>73</sup> The court was referring to a 1976 point-of-sale Chevron advertising campaign incorporating a "We Care" theme.<sup>74</sup> Stating that the record did not suggest that the Lesches ever saw any of these nine-year-old promotional materials (except decals), the court reasoned that the campaign did nothing to bolster the Lesches' case.<sup>75</sup> This was in spite of the court's recognition that "[i]t is in the area of advertising that some courts have found that major oil companies, already perilously close to broad liability by reason of what appears to be rather than what really is, have occasionally gone over the precipice."<sup>76</sup>

3. *Analysis.*—Without straining agency law principles, the *Lesch* court could have held both Bay Oil and Chevron potentially liable by allowing the jury to decide the essentially factual issue of whether the Lesches' reliance was reasonable. The facts pertaining to the issue of control do not support the neat determination that the court's language suggests. This is especially true of an item in Bay Oil's letter to Walker mandating the hours of station operation.<sup>77</sup> Many courts addressing this question have cited the oil company's authority to prescribe station hours as supporting a finding of agency status.<sup>78</sup>

Additionally, the tone of Bay Oil's letter implicates the eco-

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72. *Lesch*, 319 Md. at 36-37, 570 A.2d at 846 (quoting *Reynolds*, 227 Iowa at 171, 287 N.W. at 827).

73. 319 Md. at 39, 570 A.2d at 847.

74. *See id.* at 39-40, 570 A.2d at 847-48. The campaign was designed to encourage Chevron customers to utilize the service facilities of their dealers in addition to purchasing Chevron products. *Id.* at 39, 570 A.2d at 847.

75. *See id.* at 41, 570 A.2d at 848. The decals were visible on the service island, on the office desk, and on a service bay door. *Id.* at 40, 570 A.2d at 848.

76. *Id.* at 39, 570 A.2d at 847 (citing *Gizzi v. Texaco, Inc.*, 437 F.2d 308 (3d Cir.), *cert. denied*, 404 U.S. 829 (1971), and *Chevron Oil Company v. Sutton*, 85 N.M. 679, 515 P.2d 1283 (1973)).

77. *See* 319 Md. at 31, 570 A.2d at 843.

78. *See, e.g.*, *Dorsic v. Kurtin*, 19 Cal. App. 3d 226, 96 Cal. Rptr. 528 (1971) (franchisor's prescription of gasoline stations' operating hours was evidence of agency); *Coe v. Esau*, 377 P.2d 815 (Okla. 1963) (operator's determination of operating hours was evidence of independent contractor status), *overruled on other grounds*, *D.T.S. Tank Serv., Inc. v. Vanderveen*, 683 P.2d 1345 (Okla. 1984). In *B.P. v. Mabe*, the court noted that BP had no control over the hours of station operation. *B.P. Oil Corp. v. Mabe*, 279 Md. 632, 635, 370 A.2d 554, 557 (1977) (holding that no actual agency had been established).

conomic control that oil companies exercise over station operators. Because there are virtually no multi-brand service stations in the United States today, an oil company's refusal to renew a supply contract may lead to economic disaster for the operator.<sup>79</sup> As one commentator asserted, oil companies have the operators "in virtual bondage, hinged on the constant threat that their short-term contracts will not be renewed unless they submit to burdensome franchisor-imposed practices."<sup>80</sup>

The court gave equally constricted consideration to the facts pertaining to the apparent agency issue. Despite recognizing that advertising plays a decisive role in apparent agency cases, the court refused to give weight to Chevron's "We Care" campaign, even though decals bearing the slogan were clearly visible on the premises at the time of the injury.<sup>81</sup> Moreover, by adopting the common knowledge line of reasoning, the court was able to dismiss the apparent agency claim as a matter of law. As the record indicated, however, Chevron was aware that company-operated and company-branded stations often are indistinguishable to the public.<sup>82</sup> In light of these facts, blanket application of the common knowledge rule seems unjustified.

Outside of the service station context, courts are much less inclined to dismiss apparent agency claims.<sup>83</sup> In *Orlando Executive Park, Inc. v. Robbins*,<sup>84</sup> the Florida Supreme Court refused to apply the common knowledge line of reasoning to a case involving a national hotel franchise's apparent agency liability.<sup>85</sup> Stating that oil company cases must be limited to their facts, the court held that "[t]he existence of an agency relationship is ordinarily a question to be determined by a jury . . . on a case by case basis."<sup>86</sup> Other courts have attempted to distinguish the oil company cases on a product-

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79. Comment, *Liability of Oil Companies*, *supra* note 6, at 283.

80. Brown, *supra* note 9, at 655, 657 (characterizing the gasoline station situation as "a prime example of the worst abuses in franchising").

81. See *supra* note 74-75 and accompanying text.

82. See *infra* notes 66-68 and accompanying text.

83. See, e.g., *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 795 (3d Cir. 1978) (factual question existed as to apparent agency when evidence showed that store bags, prescription labels, cash register receipts, and local advertising all featured "Union Prescription Center" with no mention of the franchisee's name); *Wood v. Holiday Inns, Inc.*, 508 F.2d 167, 176 (5th Cir. 1975) (factual question for the jury was created when a franchise agreement provided that a motel should be constructed and operated so as to be "readily recognizable by the public as part of the national system of Holiday Inns").

84. 433 So. 2d 491 (Fla. 1983).

85. See *id.* at 494. *Accord Drexel*, 582 F.2d at 796 n.23.

86. 433 So. 2d at 494 (citations omitted) (distinguishing "oil company cases" from other apparent agency situations).

versus-service rationale.<sup>87</sup>

The pertinent question, therefore, is not whether the court could have allowed the jury to determine the liability of Bay Oil or Chevron, but why it did not do so. Service station cases employing similarly restrictive interpretations of the agency liability tests usually fail to articulate any policy basis for their decisions.<sup>88</sup>

Many commentators have criticized courts for perpetuating an unnecessarily narrow application of the agency liability tests in service station cases.<sup>89</sup> This approach often results in harsh consequences for injured plaintiffs, because station operators frequently lack the financial resources or insurance necessary to provide adequate compensation.<sup>90</sup> The primary argument advanced in favor of liberalizing these tests is one of fundamental fairness.<sup>91</sup> The argument is that because of the many benefits oil companies derive from the present distribution system,<sup>92</sup> it is "not particularly unfair or immoral" to require that some of the benefits be returned to those

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87. See, e.g., *Mehlman v. Powell*, 281 Md. 269, 378 A.2d 1121 (1977). *Mehlman* involved the issue of whether a hospital may be held liable on apparent agency grounds for a tortious act committed by an emergency-room physician engaged as an independent contractor. The court distinguished *B.P. Oil Corp. v. Mabe*, 279 Md. 632, 370 A.2d 554 (1977), as follows: "The mere fact that BP products are advertised for sale does not, in itself, justify the inference that BP is as well directly providing automotive services. The Hospital, however, is engaged in the business of providing health care services." *Mehlman*, 281 Md. at 274, 378 A.2d at 1124 (emphasis in original). The assertion that the general public does not associate automotive service with nationally-branded service stations is at least questionable. Consider the following excerpt from Chevron's "Station Acquisition Manual" of March 1984: "In our industry, a branded station has become a visual statement to the world about our products and services." *Lesch v. Chevron, U.S.A., Inc.*, 75 Md. App. 669, 678, 542 A.2d 1292, 1296 (1988) (emphasis added) (quoting the manual as evidence that Chevron intended to assure that company-branded stations would be "indistinguishable in the public mind").

88. See Comment, *Liability of Oil Companies*, *supra* note 6, at 269. The *Lesch* court justified its decision by stating that it is "inefficient to impose liability on sellers for illogical or unreasonable beliefs of buyers." 319 Md. 25, 44, 570 A.2d 840, 849-50 (1990) (quoting from Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1277 (1984)). This argument is predicated on the validity of the court's prior determination that the *Lesches'* belief was in fact "unreasonable."

89. See *supra* notes 6, 9.

90. See Comment, *Service Station Torts*, *supra* note 6, at 406 (proposing a legislative approach to risk allocation whereby oil companies would be required to procure adequate insurance to compensate for injuries incurred at stations they own); Comment, *Liability of Oil Companies*, *supra* note 6, at 284-85 (criticizing the oil industry for failing to require that franchisees be financially responsible).

91. See Comment, *Liability of Oil Companies*, *supra* note 6, at 281.

92. These benefits include: control over business without full investment responsibility, credit card systems, a necessary outlet for company products, and insulation from tort liability. *Id.*

harméd in the process.<sup>93</sup>

4. *Conclusion.*—The approach adopted by the *Lesch* court, with its narrow reading of the facts and interpretation of the tests of agency liability, diminishes the prospect that similar cases will withstand summary judgment motions. By advocating the common knowledge rule's blanket application to service station cases, the court effectively closed the door to most future claims based on an apparent agency theory. While nonservice station claims will continue to enjoy more favorable case-by-case treatment, plaintiffs with claims against service stations will have to present an extraordinary case in order to reach the jury.

#### B. *Willful Misconduct in Negligence Claims*

In *Saba v. Darling*,<sup>94</sup> the Court of Appeals considered whether the plaintiff had a viable negligence claim if the defendant's willful misconduct arguably was partially attributable to his intoxication.<sup>95</sup> Although the misconduct consisted of a punch that fractured the plaintiff's jaw, the plaintiff proceeded against the defendant on a negligence theory in order to reach his insurance coverage.<sup>96</sup>

The court rejected the plaintiff's attempt to connect the causation claim to the defendant's alcohol consumption.<sup>97</sup> The court also rejected the argument that the defendant, knowing he had a propensity to fight while under the influence of alcohol, acted with reckless disregard for the safety of others when he began drinking.<sup>98</sup> Rather, the court found that the defendant's assault on the plaintiff was an intentional act, and thus precluded any negligence theory.<sup>99</sup> The decision is a minor victory for insurance companies, because they clearly will not be held to monitor the drinking habits of their policy holders.

1. *The Case.*—Markus Saba and Charles Darling, who had never met, were both out drinking with friends in Washington, D.C. on June 16, 1984.<sup>100</sup> Saba drank beer at a friend's house before

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93. *Id.*

94. 320 Md. 45, 575 A.2d 1240 (1990).

95. *See id.* at 46, 575 A.2d at 1241.

96. *Id.* at 47, 575 A.2d at 1241.

97. *See id.* at 51, 575 A.2d at 1243-44.

98. *See id.*, 575 A.2d at 1243.

99. *Id.*, 575 A.2d at 1243-44.

100. *Id.* at 46, 575 A.2d at 1241. The court did not explain why it applied Maryland law to a case that arose in Washington, D.C. Ordinarily, Maryland adopts the principle

travelling to a bar, where he consumed two to three additional beers within an hour. Darling and a friend shared a six-pack of beer before travelling to the same bar, where Darling consumed about five additional beers.<sup>101</sup>

Darling and Saba left the bar at about the same time.<sup>102</sup> There is disagreement as to exactly what happened next.<sup>103</sup> It appears that Saba, who has no recollection of what happened, was "shadowboxing" and making karate motions near Darling. Saba and Darling may have exchanged profanities, and Saba may have touched Darling. In any event, Darling punched Saba in the face, fracturing Saba's jaw. Darling subsequently admitted that he had a history of fighting when under the influence of alcohol.<sup>104</sup>

Saba sued Darling in the Circuit Court for Montgomery County, alleging both negligence, and assault and battery.<sup>105</sup> Saba voluntarily dismissed the assault and battery claim after he discovered that Darling's insurance policy specifically excluded payment to others if the insured meant to cause bodily injury.<sup>106</sup> The negligence claim went to the jury, which decided in favor of Darling, apparently because they found Saba contributorily negligent.<sup>107</sup> In his appeal to the Court of Special Appeals, Saba asserted that the trial judge should have instructed the jury that simple contributory negligence does not bar a claim of gross negligence.<sup>108</sup>

The Court of Special Appeals declined to decide whether simple contributory negligence bars a gross negligence action, instead holding that there was no evidence of Darling's negligence, and that the case should not even have been submitted to the jury on the

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of *lex loci* in tort cases, and thus applies the substantive law of the jurisdiction where the tort occurred. See *Hauch v. Connor*, 295 Md. 120, 453 A.2d 1207 (1983). Maryland statutory law requires litigants to provide notice when they intend to argue that the law of another jurisdiction applies to their case. MD. CTS. & JUD. PROC. CODE ANN. § 10-501 to -507 (1989). When notice is not given, the court may in its discretion assume that Maryland law applies, or that the law of the jurisdiction in question is identical to Maryland's. See *Frericks v. General Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975). Presumably, in this case the court applied this discretionary doctrine.

101. 320 Md. at 46, 575 A.2d at 1241.

102. *Id.*

103. *Id.* at 47, 575 A.2d at 1241.

104. *Id.*

105. *Id.*

106. *Saba v. Darling*, 72 Md. App. 487, 488-89, 531 A.2d 696, 696 (1987), *aff'd*, 320 Md. 45, 575 A.2d 1240 (1990).

107. *Saba*, 320 Md. at 47, 575 A.2d at 1241. During their deliberations, the jury sent a note to the judge concerning contributory negligence, which the judge declined to answer. *Id.* at 47 n.1, 575 A.2d at 1241 n.1.

108. *Id.* at 47, 575 A.2d at 1241-42.

negligence theory.<sup>109</sup> Because the jury found for the defendant anyway, the court simply affirmed the lower court's judgment.<sup>110</sup> The Court of Appeals granted certiorari,<sup>111</sup> and affirmed the Court of Special Appeals' decision.<sup>112</sup>

2. *The Case.*—In his appeal, Saba advanced two arguments to support his negligence cause of action. First, he argued that Darling's drinking created an unreasonable risk of physical harm to others, in light of his admitted history of fighting when under the influence of alcohol.<sup>113</sup> According to Saba, Darling acted with reckless disregard for the safety of others as defined by the *Second Restatement of Torts*, section 500.<sup>114</sup> The negligence cause of action, therefore, was predicated upon the reckless act of drinking, which had the unintended but foreseeable result of injury to another.<sup>115</sup>

Second, Saba argued that the holding of *Nast v. Lockett*<sup>116</sup> should be extended to cover this case.<sup>117</sup> In *Nast*, the Court of Appeals held that reckless disregard for human life may be inferred

109. *Saba v. Darling*, 72 Md. App. at 492, 531 A.2d at 698. The court noted that when Saba dismissed his assault and battery claim, "he effectively terminated his viable cause of action." *Id.*

110. *See id.* at 493, 531 A.2d at 698.

111. *Saba v. Darling*, 311 Md. 698, 537 A.2d 262 (1988) (granting certiorari).

112. *Saba*, 320 Md. at 51, 575 A.2d at 1244.

113. *See id.* at 48, 575 A.2d at 1242.

114. Section 500 of the *Restatement* provides:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

RESTATEMENT (SECOND) OF TORTS § 500 (1965).

115. *See Saba*, 320 Md. at 48, 575 A.2d at 1242. Saba contended that comment f to *Restatement* § 500 applies:

Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.

RESTATEMENT (SECOND) OF TORTS § 500 comment f (1965). The Court of Appeals has cited comment f for the proposition that "[r]eckless, wanton or wilful misconduct differs from intentional wrongdoing." *Johnson v. Mountaire Farms of Delmarva, Inc.*, 305 Md. 246, 253, 503 A.2d 708, 712 (1986) (element of desire distinguishes intentional from reckless acts).

116. 312 Md. 343, 539 A.2d 1113 (1988).

117. *Saba*, 320 Md. at 48-49, 575 A.2d at 1242.

when an individual drives while intoxicated.<sup>118</sup> Saba suggested that it might sometimes be appropriate to infer recklessness from the act of becoming intoxicated, even if the intoxicated person does not get behind the wheel of a car.<sup>119</sup>

Both of Saba's arguments attempted to portray Darling's drunkenness as the cause of Saba's injuries. The Court of Appeals was not persuaded by either argument because it was convinced that Saba's injuries were the result of an intentional battery.<sup>120</sup> In the court's view, there was not a strong probability that such a battery would result from Darling becoming intoxicated,<sup>121</sup> and the intoxication was independent of the intentional battery.<sup>122</sup> The court rejected the negligence cause of action because "the nexus between Darling's drinking and the battery upon Saba is too flimsy a thread to support an action of gross negligence."<sup>123</sup>

3. *Analysis.*—The court correctly refused Saba's request to apply the *Nast v. Lockett* holding because *Nast* involved a question fundamentally different from that in the case at bar. The injuries in *Nast* resulted from an unintentional, negligent act.<sup>124</sup> The question presented on appeal was whether the defendant's intoxication was a sufficient basis to allow the jury to consider the issue of punitive damages.<sup>125</sup> In no way does *Nast* hold or even suggest that intoxication might convert an intentional act into a negligent one, as Saba unsuccessfully tried to argue. To the contrary, *Nast* suggests that in some situations, the act of drinking and driving may cause a negli-

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118. See 312 Md. at 362-63, 539 A.2d at 1123. In *Nast*, the plaintiff sought an inference of recklessness in order to supply the legal malice necessary to obtain punitive damages. *Id.* at 362, 539 A.2d at 1122. The Court of Appeals held that an inference of a drunk driver's wanton or reckless disregard for human life must be measured on a sliding scale. *Id.* Whether such an inference is permissible in an individual case depends on the manner in which the vehicle was operated and the degree of the operator's intoxication. *Id.* at 362-63, 539 A.2d at 1122-23.

119. See *Saba*, 320 Md. at 48-49, 575 A.2d at 1242.

120. See *id.* at 49, 575 A.2d at 1242. The intentional tort of battery requires an injury resulting from intended harmful or offensive contact. See RESTATEMENT (SECOND) OF TORTS § 13 (1965). If the contact was intentional, it does not matter that any resulting injuries were far greater than intended. See RESTATEMENT (SECOND) OF TORTS § 13 comment c (1965).

121. See *Saba*, 320 Md. at 51, 575 A.2d at 1243.

122. See *id.*

123. *Id.* (quoting with approval *Saba v. Darling*, 72 Md. App. 487, 491, 531 A.2d 696, 698 (1987)).

124. 312 Md. 343, 361, 539 A.2d 1113, 1122 (1988).

125. *Id.* at 348, 539 A.2d at 1116.

gent act to fall "just short of willful or intentional."<sup>126</sup>

Similarly, Saba's reliance on section 500 of the *Restatement* was misplaced. Section 500 defines a standard of conduct surpassing mere negligence, but falling short of intentional misconduct.<sup>127</sup> Because the facts show an intentional battery, neither *Nast v. Lockett* nor section 500 is on point.

To prevail on his theory that Darling's intoxication caused his injuries, Saba would have had to convince the court that Darling's punch was either negligent, mistaken, or inadvertent, or that Darling was so intoxicated that he was incapable of forming the conscious intent necessary for an act of battery.<sup>128</sup> Saba did not argue either of these theories,<sup>129</sup> but the court made clear that these arguments would have failed, given the evidence in the case.<sup>130</sup>

The court implicitly assumed that battery and negligence are mutually exclusive—that if the act was a battery there can be no recovery in negligence. Although the Court of Special Appeals has previously indicated that "the presence of an intent to do an act does not preclude negligence,"<sup>131</sup> there is little authority on this question. Because the *Saba* court based its decision on a fact situation that it deemed was a clear battery, it presumes too much to conclude that battery and negligence can never overlap in Maryland.

4. *Conclusion.*—As this case demonstrates, distinguishing negligence from intentional torts is sometimes of great practical importance. Liability insurance policies usually exclude coverage for intentional acts.<sup>132</sup> Plaintiffs such as Saba often seek to establish

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126. *Id.* at 351, 539 A.2d at 1117 (quoting *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 168, 297 A.2d 721, 731 (1972)).

127. See RESTATEMENT (SECOND) OF TORTS § 500 comment a (1965).

128. See *Saba*, 320 Md. at 50, 575 A.2d at 1243. Maryland recognizes voluntary intoxication as a defense to a criminal action under the theory that voluntary intoxication may prevent a defendant from forming the mens rea required of a specific intent crime. See *Shell v. State*, 307 Md. 46, 512 A.2d 358 (1986) (examining whether voluntary intoxication negated the offender's intent to transport handguns); see also *Developments in Maryland Law*, 1986-87, 47 Md. L. Rev. 855 (1988) (discussing *Shell*).

129. See *Saba*, 320 Md. at 50, 575 A.2d at 1243.

130. See *id.*

131. *Ghassemieh v. Schafer*, 52 Md. App. 31, 40, 447 A.2d 84, 89 (1982). The plaintiff in *Ghassemieh* sought to recover in negligence for an intentionally inflicted injury (the defendant pulled a chair out from under the plaintiff while she was in the act of sitting down), apparently because the one-year statute of limitations for battery had run. *Ghassemieh*, 52 Md. App. at 33 n.2, 447 A.2d at 86 n.2; see MD. CTS. & JUD. PROC. CODE ANN. § 5-105 (1980).

132. See Note, *The Intentional Injury Exclusion: When Is There No Intent Behind the Intention?*, 11 AM. J. TRIAL ADVOC. 527 (1988).



negligence rather than an intentional tort in order to reach the "deep pocket" of the insurance company.<sup>133</sup>

Because the duty to defend extends to all claims potentially within the policy's coverage,<sup>134</sup> insurance companies must pay to defend any suit against the insured that contains allegations which, if proven, the policy would cover.<sup>135</sup> To the extent that *Saba v. Darling* establishes a bright-line test distinguishing battery from negligence, plaintiffs will find it more difficult to make good faith allegations of negligence.<sup>136</sup> *Saba*, therefore, may provide some relief to insurance companies unfairly saddled with defending claims that in fact are outside the coverage of their policies.

### C. *Insurer Intervention on the Issue of Policy Coverage*

In *Allstate Insurance Company v. Atwood*,<sup>137</sup> the Court of Appeals held that an insurance company is entitled to relitigate insurance coverage issues that have not been fairly litigated in a tort trial involving its insured.<sup>138</sup> The court reversed the Court of Special Appeals, which found appropriate the insurer's intervention in the tort trial.<sup>139</sup> Instead, the court approved a procedure allowing an insurer to bring a post-judgment complaint for declaratory relief without prior intervention.<sup>140</sup> Under this new procedure, the insurer must file a motion to intervene and a complaint for declaratory relief within ten days after entry of judgment in the tort trial.<sup>141</sup> If the trial judge finds that the tort trial fairly litigated the coverage issue, then the trial judgment binds the insurer; if not, relitigation of the issue may proceed in the declaratory judgment action.<sup>142</sup> In this

133. As a result, problems of plaintiff-defendant collusion, and of potential conflict of interest often arise, a problem the Court of Appeals addressed in *Allstate Ins. Co. v. Atwood*, 319 Md. 247, 572 A.2d 154 (1990). Plaintiffs also may want to establish negligence, rather than an intentional tort, because the statutory limitations period may differ. See *supra* note 131.

134. *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 409-10, 347 A.2d 842, 850-51 (1975). See generally Janquitto, *Insurer's Duty to Defend in Maryland*, 18 U. BALT. L. REV. 1 (1988).

135. *Brohawn*, 276 Md. at 407-08, 347 A.2d at 850.

136. When claims are made in bad faith to invoke insurance coverage, the insurer has recourse against the claimant and his attorney under Maryland Rule 1-341. MD. R. 1-341.

137. 319 Md. 247, 572 A.2d 154 (1990).

138. See *id.* at 262, 572 A.2d at 161.

139. See *Allstate Ins. Co. v. Atwood*, 71 Md. App. 107, 113-14, 523 A.2d 1066, 1069 (1987), *rev'd*, 319 Md. 247, 572 A.2d 154 (1990).

140. See 319 Md. at 264, 572 A.2d at 162.

141. *Id.*; see *infra* note 194 and accompanying text.

142. *Id.* at 263, 572 A.2d at 162.

manner, the insurer's interests can be protected without the potential unfairness to the litigants that pre-judgment intervention would pose.<sup>143</sup>

1. *The Case.*—John Atwood struck Raymond Dacek in the face on October 31, 1983.<sup>144</sup> Dacek filed suit against Atwood in the Circuit Court for Montgomery County, alternatively alleging that he was injured by Atwood's negligence or by intentional assault and battery. Although Atwood was covered by his parents' homeowner's insurance policy with Allstate Insurance Company (Allstate), the policy excluded from its coverage intentionally caused injuries.<sup>145</sup> Before the suit came to trial, Allstate filed a declaratory judgment action contending that Atwood's deposition testimony admitted intentional assault and battery, and therefore its policy did not cover Dacek's injuries.<sup>146</sup> The court dismissed as premature Allstate's declaratory action, and a jury eventually found in Dacek's favor on the negligence claim. Allstate brought a second declaratory judgment action, which the court dismissed, and Allstate subsequently appealed.<sup>147</sup>

The Court of Special Appeals affirmed the declaratory judgment action's dismissal, and held that Allstate was bound by the jury's determination that Atwood acted negligently.<sup>148</sup> This implicitly decided the coverage issue.<sup>149</sup> The court relied on *Brohawn v. Transamerica Insurance Co.*,<sup>150</sup> and said that Allstate could have protected its interests by hiring independent counsel to represent Atwood, then intervening as a party in the tort trial.<sup>151</sup> Having failed to exercise this option, Allstate was bound by the trial court's determination.<sup>152</sup> The Court of Appeals granted Allstate's petition for certiorari.<sup>153</sup>

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143. See *infra* notes 170-177 and accompanying text.

144. *Allstate Ins. Co. v. Atwood*, 71 Md. App. 107, 108, 523 A.2d 1066, 1067 (1987), *rev'd*, 319 Md. 247, 572 A.2d 154 (1990).

145. *Allstate*, 319 Md. at 249-50, 572 A.2d at 155. The policy provided that Allstate "will pay all sums arising from the same loss which an insured person becomes legally obligated to pay as damages because of bodily injury or property damage covered by this part of the policy," but contained an exclusion for "bodily injury . . . intentionally caused by an insured person." *Id.* at 250, 572 A.2d at 155.

146. 71 Md. App. at 109, 523 A.2d at 1067.

147. 319 Md. at 250-51, 572 A.2d at 155-56; 71 Md. App. at 109, 523 A.2d at 1067.

148. See 71 Md. App. at 114, 523 A.2d at 1070.

149. See *id.*

150. 276 Md. 396, 347 A.2d 842 (1975).

151. See 71 Md. App. at 111-12, 523 A.2d at 1068.

152. *Id.* at 114, 523 A.2d at 1070.

153. See *Allstate*, 319 Md. at 251, 572 A.2d at 156.

## 2. *Legal Background and the Court's Reasoning.*—

a. *Declaratory Judgments.*—The Maryland Uniform Declaratory Judgments Act<sup>154</sup> authorizes courts to construe written contracts,<sup>155</sup> declare parties' rights,<sup>156</sup> and end actual controversies by granting discretionary relief.<sup>157</sup> Insurers often use declaratory judgment actions to determine whether they have a duty to defend their insured.<sup>158</sup> Despite the Declaratory Judgments Act's broad language, the Court of Appeals has limited insurers' ability to obtain declaratory judgments by finding that a declaratory judgment is inappropriate if the issue to be decided will be resolved in the pending tort action.<sup>159</sup>

b. *The Duty to Defend.*—A liability insurer usually has a contractual duty to defend claims against those it insures.<sup>160</sup> The pending tort action's allegations determine the insurer's duty to defend:<sup>161</sup> the insurer "must defend if there is a *potentiality* that the claim could be covered by the policy."<sup>162</sup> An insurer may be relieved of its duty to defend the insured if there is evidence of the insured's collusion or bad faith.<sup>163</sup>

When a plaintiff's complaint against an insured contains allegations that the insured negligently or intentionally inflicted injuries,

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154. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-401 to -415 (1989).

155. *See id.* at § 3-406.

156. *See id.*

157. *See id.* § 3-409(a); *see, e.g.,* Northern Assurance Co. v. EDP Floors, Inc., 311 Md. 217, 222-24, 533 A.2d 682, 685 (1987) (court acted properly to authorize declaratory judgment when a justiciable controversy existed). For a general discussion of the appropriateness of a declaratory judgment action, *see* Harpy v. Nationwide Mut. Fire Ins. Co., 76 Md. App. 474, 477, 545 A.2d 718, 720 (1988).

158. *See* Note, *Use of Declaratory Judgment to Determine a Liability Insurer's Duty to Defend—Conflict of Interests*, 41 IND. L.J. 87, 95-98 (1965); *see generally* Comment, *The Insurer's Duty to Defend Under a Liability Insurance Policy*, 114 U. PA. L. REV. 734 (1966) (review of the effect of collateral issues upon the duty to defend).

159. *See* Brohawn v. Transamerica Ins. Co., 276 Md. 396, 405, 347 A.2d 842, 848 (1975). A pre-trial declaratory action is still available if the coverage issue is independent and separable from the questions presented in the pending suit. *See id.*

160. *See* Janquitto, *Insurer's Duty to Defend in Maryland*, 18 U. BALT. L. REV. 1, 3-6 (1988).

161. *See* Brohawn, 276 Md. at 407, 347 A.2d at 850.

162. *Id.* at 408, 347 A.2d at 850 (emphasis in original) (citing *U.S.F. & G. v. National Paving & Contracting Co.*, 228 Md. 40, 54, 178 A.2d 872, 879 (1962)).

163. *See* Oweiss v. Erie Ins. Exch., 67 Md. App. 712, 719-20, 509 A.2d 711, 715 (1986). *See also* Janquitto, *supra* note 160, at 14 n.70 (Oweiss suggested that collusion between the insured and the claimant might abrogate the insurer's duty to defend the insured).

the insurer potentially faces a conflict of interests.<sup>164</sup> Although both insured and insurer would prefer a jury finding of no liability, their interests diverge if the jury finds the insured liable.<sup>165</sup> If this happens, the insured party would be served best by a finding of liability based on negligence, which would obligate the insurer to settle the claim. Conversely, the insurer wants a finding that the harm was inflicted intentionally, which frees it from indemnification obligations.<sup>166</sup> Collusion between the plaintiff and the defendant may also occur, because each has incentive to characterize the action so that it comes within the insurance policy's coverage.<sup>167</sup>

The insurer's counsel may have mixed loyalties in this situation. Recognizing this, the Court of Appeals held in *Brohawn* that in order to avoid attorney conflicts of interests, the insurer may be required to provide the insured with independent counsel.<sup>168</sup> The court made clear that a conflict of interest did not relieve an insurer's contractual duty to defend the insured.<sup>169</sup>

c. *Pre-Trial Declaratory Judgments.*—In *Brohawn*, Transamerica Insurance Company sought to extricate itself from the suit by having the coverage issue resolved by declaratory judgment before the case went to trial.<sup>170</sup> In considering the appropriateness of a pre-trial proceeding concerning questions at issue in the trial, the Court of Appeals stressed the proceeding's potential unfairness to the principal parties.<sup>171</sup> The plaintiffs would be inconvenienced, because they would lose control of the litigation to the insurer. More significantly, the defendant would be successively forced to defend against the insurance company and the plaintiff.<sup>172</sup> Because of this arrangement's "essential unfairness,"<sup>173</sup> the court held that declara-

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164. See *Brohawn*, 276 Md. at 409, 347 A.2d at 851.

165. *Id.*

166. See *id.*

167. The insured seeks to avoid personal liability, and the plaintiff seeks a collectible judgment. Even absent collusion, a defense attorney protecting the insured's interests may be tempted to settle claims by admitting negligence rather than risk a trial. See *Allstate*, 319 Md. at 253, 572 A.2d at 157 (citing Petitioner's Brief, No. 87-84, at 15).

168. See 276 Md. 396, 411, 347 A.2d 842, 852 (1975).

169. See *id.* at 412, 347 A.2d at 853. Because the insurer's duty to defend is contractual, it could limit its obligation through the contract's language. See *id.* at 410, 347 A.2d at 851.

170. See *id.* at 400-01, 347 A.2d at 846.

171. See *id.* at 406-07, 347 A.2d at 849-50.

172. See *id.* The insurance company may expose its insured to punitive damages if it seeks to establish that the insured intentionally inflicted the plaintiff's injuries. See *id.* at 406, 347 A.2d at 849.

173. *Id.* at 407, 347 A.2d at 850.

tory relief was unavailable.<sup>174</sup>

*d. Intervention.*—Generally, an insurer is bound by tort trial findings against its insured.<sup>175</sup> Because pre-trial declaratory judgment actions are permitted only in limited circumstances, an insurer seemingly has no means to protect its interests, other than to intervene as a party in the trial. The Court of Special Appeals recognized this dilemma and held that an insurer was entitled to intervene in a conflict of interest situation arising in a tort action as long as it provided the insured with independent counsel.<sup>176</sup>

*e. The Court's Reasoning.*—In resolving *Allstate*, the Court of Appeals first considered *Brohawn's* prohibition against pre-trial determination of issues to be litigated in a pending lawsuit.<sup>177</sup> The court reaffirmed this prohibition,<sup>178</sup> with one new exception: a declaratory judgment now is available for claims that are patent attempts to characterize intentional acts as negligent acts.<sup>179</sup> This exception is designed to reach claims of "negligent" sexual assault and the like, in which "the nature and character of the act is such that the intent to inflict injury may be inferred as a matter of law."<sup>180</sup> By masking these intentional actions in a complaint alleging only negligence, an

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174. See *id.* Pre-trial declaratory actions would be appropriate, however, when the coverage issue related to an interpretation of the insurance contract, or was otherwise independent from the allegations in the pending lawsuit. See *id.* at 405, 347 A.2d at 848; see, e.g., *Northern Assurance Co. v. EDP Floors, Inc.*, 311 Md. 217, 223, 533 A.2d 682, 685 (1986) (declaratory judgment appropriate when the insured had a material interest in seeking an interpretation of its policy's exclusionary language, to determine which of its insurance carriers to look to for coverage and defense; *St. Paul Fire & Marine Ins. Co. v. Pryseski*, 292 Md. 187, 194, 438 A.2d 282, 286 (1981) (action was appropriate if the question of interpretation was whether the term "occurrence" includes intentional tortious conduct); *Bankers & Shippers Ins. Co. v. Electro Enters.*, 287 Md. 641, 644-45, 415 A.2d 278, 281 (1980) (action was appropriate to determine whether a clause which excluded coverage unless two specific individuals were operating the plane was effective to deny coverage if only one of the named individuals was on the plane when it crashed).

175. See *Travelers Ins. Co. v. Godsey*, 260 Md. 669, 675-77, 273 A.2d 431, 435-36 (1971) (insurer was bound by the principle of collateral estoppel on the issues litigated and determined in the first trial); *Glen Falls Ins. Co. v. American Oil Co.*, 254 Md. 120, 134-35, 254 A.2d 658, 666 (1969) (according to the rule of collateral estoppel, the named party and any unnamed participants in the litigation are bound by the trial determination).

176. See *Allstate Ins. Co. v. Atwood*, 71 Md. App. 107, 111-12, 523 A.2d 1066, 1068 (1987), *rev'd*, 319 Md. 247, 572 A.2d 154 (1990).

177. See *Allstate*, 319 Md. at 251, 572 A.2d at 156.

178. See *id.* at 255, 572 A.2d at 158.

179. See *id.* at 253, 572 A.2d at 157.

180. *Id.* (quoting *Troelstrup v. District Court*, 712 P.2d 1010, 1013 (Colo. 1986) (because the plaintiff alleged more than the defendant's negligence, including claims of homosexual acts and sexual assault on a minor, which were acts outside the terms of the

insurer would be obligated to defend its insured under the "potentiality" rule.<sup>181</sup> The court also held that an insurer's failure to seek pre-trial relief does not impair its post-trial proceeding rights.<sup>182</sup>

The court reviewed the Court of Special Appeals' opinion, which held that insurer intervention was appropriate in a conflict of interest situation.<sup>183</sup> The Court of Appeals reversed this holding and stated that the intermediate court failed to consider the policies underlying *Brohawn's* prohibition against an insurer's pre-trial actions.<sup>184</sup> In the court's view, these policy considerations applied with equal force to the question of whether an insurer could intervene.<sup>185</sup> Furthermore, inserting the issue of insurance coverage into a tort trial would be unfairly prejudicial.<sup>186</sup>

The court also considered whether an insurer could obtain post-trial relief.<sup>187</sup> The court held that in a conflict of interest situation an insurer was entitled to bring a post-trial declaratory judg-

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defendant's insurance policy, the insurer was entitled to a declaratory judgment prior to the personal injury trial).

181. See *supra* notes 161-162 and accompanying text.

182. See *Allstate*, 319 Md. at 255, 572 A.2d at 158. The court wanted to discourage insurers' unnecessary pre-trial declaratory judgment actions; therefore, even when no action is filed, an insurer can obtain a post-trial declaratory judgment if the issues presented were not fairly litigated in the tort trial. *Id.* at 255, 262, 572 A.2d at 158, 161.

183. See *Allstate Ins. Co. v. Atwood*, 71 Md. App. 107, 111-12, 523 A.2d 1066, 1068 (1987), *rev'd*, 319 Md. 247, 572 A.2d 154 (1990). The Court of Special Appeals reasoned that the *Brohawn* decision, requiring the insurance company to provide independent counsel when a conflict of interest arises, raises the "inference that the insurer might also be represented at trial so as to protect its interest." *Id.* at 112, 523 A.2d at 1068. Consequently, an insurer is not prevented from intervening in the tort case against the insured "as long as the insured is not cast adrift and left to fend for himself or herself against the wealth and resources of the carrier." *Id.* at 113, 523 A.2d at 1069.

184. See *Allstate*, 319 Md. at 256, 572 A.2d at 158. The court summarized the policies that would preclude insurance company intervention in the tort case. First, the court considered the "essential unfairness" to both the plaintiff and the defendant. When the insurance companies took over prosecuting the claims, plaintiffs would be stripped of control over their own cases and would be forced to defend against both the plaintiff and their own insurance companies. See *id.* at 257, 572 A.2d at 159. Second, allowing insurance companies to intervene would "be tantamount to authorizing direct actions by plaintiffs against defendants' liability insurers," and these are actions that Maryland law specifically prohibits. *Id.* Finally, because "the matter of liability insurance is irrelevant to the issue of defendant's liability and is highly prejudicial," Maryland courts in tort trials usually exclude evidence relating to insurance. *Id.* at 258, 572 A.2d at 159. Allowing insurance companies to intervene would be tantamount to admitting insurance evidence. *Id.* at 256-58, 572 A.2d at 159.

185. See *id.* at 257, 572 A.2d at 159.

186. See *id.* at 258, 572 A.2d at 159. The court noted that in tort trials, evidence of insurance coverage is inadmissible. *Id.*

187. See *id.* at 259-63, 572 A.2d at 160-62.

ment action.<sup>188</sup> The court reasoned that although an insurer ordinarily was bound by a judgment against its insured,<sup>189</sup> it was unfair to bind an insurer to the trial's outcome if it had no opportunity to litigate its issues.<sup>190</sup> Thus, if the judge hearing Allstate's action finds that the coverage issue was not fairly litigated in the tort trial, Allstate will be entitled to relitigate that issue.<sup>191</sup>

Even though it held that Allstate was entitled to bring a post-trial declaratory judgment action, the court noted that there were "undesirable aspects to this procedure," and added that in the future, actions of this sort would not be permitted.<sup>192</sup> Instead, insurers seeking this type of relief should intervene in the tort trial, after the entry of judgment.<sup>193</sup> The insurer must file its motion to intervene, along with a motion under Maryland Rules 2-532, 2-533, or 2-534,<sup>194</sup> and a complaint for declaratory relief, after the jury's verdict or the court's decision in the tort case, but no later than ten days after the entry of judgment.<sup>195</sup>

3. *Analysis.*—In resolving these conflict of interests situations, a court must consider the interests of three parties: the injured plaintiff, the insured defendant, and the insurer. In *Brohawn*, the Court of Appeals held that an insurer was not entitled to a pre-trial declaratory judgment proceeding concerning a coverage question that would be at issue in the subsequent tort trial, because this would be unfair to the plaintiff and the insured defendant.<sup>196</sup> *Brohawn* did not address the question of what relief, if any, was available to an insurer victimized by fraud or collusion between the plaintiff and the defendant.

The Court of Special Appeals read *Brohawn* as suggesting that

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188. See *id.* at 262, 572 A.2d at 161.

189. See *id.* at 260, 572 A.2d at 160.

190. See *id.* at 262-63, 572 A.2d at 161-62. Unfairness could result if the plaintiff and the defendant cooperated to convince the fact-finder that an act was negligent rather than intentional, thus making the insurance company liable. *Id.*

191. See *id.* at 262, 572 A.2d at 161.

192. See *id.* at 263-64, 572 A.2d at 162. The "undesirable aspects" include the possibility of conflicting final judgments, the multiplicity of appeals, and the likelihood that the declaratory action would not be held before the same judge who presided over the trial. See *id.*

193. See *id.* at 264, 572 A.2d at 162.

194. See MD. R. 2-532 (motion for judgment notwithstanding the verdict); 2-533 (motion for new trial); and 2-534 (motion to alter or amend a judgment). These rules render the tort judgment nonfinal. After the tort judgment is determined to be nonfinal, the insurer may intervene as a party and request declaratory relief.

195. *Allstate*, 319 Md. at 264, 572 A.2d at 162.

196. See *Brohawn*, 276 Md. at 406-07, 347 A.2d at 849-50.

an insurer could intervene in the tort trial as a third party.<sup>197</sup> The Court of Appeals rejected this interpretation, because it realized that this procedure would be even more prejudicial to the insured party than the pre-trial procedure rejected in *Brohawn*.<sup>198</sup>

If the availability of a pre-trial declaratory judgment is limited, and an insurer may not intervene in the trial, then some sort of post-trial relief is needed to protect the insurer from fraud or collusion. Recognizing this, the court held that an insurer is entitled to file a post-trial declaratory judgment motion.<sup>199</sup> Upon such motion the trial court must then determine, as a matter of law, whether the tort trial fairly litigated the insurance coverage issue.<sup>200</sup> If it was fairly litigated, the trial determination is binding on the insurer.<sup>201</sup> If the judge finds that the issue was not fairly litigated, however, the insurer may relitigate the coverage question in a declaratory judgment action.<sup>202</sup>

Authority from other jurisdictions is consistent with the Court of Appeals' view that pre-trial declaratory judgments and insurer intervention in tort trials are not appropriate.<sup>203</sup> Few decisions, however, have sanctioned post-trial relief,<sup>204</sup> and *Allstate v. Atwood*

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197. See *Allstate Ins. Co. v. Atwood*, 71 Md. App. 107, 111-12, 523 A.2d 1066, 1068 (1987), *rev'd*, 319 Md. 247, 572 A.2d 154 (1990).

198. See *Allstate*, 319 Md. at 256, 572 A.2d at 158; see also *supra* note 184.

199. See *Allstate*, 319 Md. at 262-63, 572 A.2d at 161-62.

200. *Id.* at 262, 572 A.2d at 161.

201. *Id.*

202. *Id.*

203. See *Restor-a-Dent Dental Lab v. Certified Alloy Prods.*, 725 F.2d 871, 875 (2d Cir. 1984) (holding that an insurer has no right to intervene because it had no direct interest in the litigation until the liability of its insured was determined); *Cromer v. Sef-ton*, 471 N.E.2d 700, 704 (Ind. App. 1984) ("To permit intervention by the insurer to litigate coverage in the principal tort case against its insured would distract the trier and literally force the plaintiff to become embroiled in a matter in which she does not yet have an interest."); *Kaczmarek v. Shoffstall*, 119 App. Div. 2d 1001, 1002, 500 N.Y.S.2d 902, 903 (1986) (insurer cannot intervene where its interests are "unrelated to the subject matter of the action and can in no way be characterized as claims or defenses to the action.").

204. See *Allstate*, 319 Md. at 263, 572 A.2d at 162. The *Allstate* opinion cited only three cases to support its proposition that a declaratory judgment action is permissible after the tort trial closes. See *id.* They are: *Farmers Ins. Co. of Arizona v. Vagnozzi*, 138 Ariz. 443, 448, 675 P.2d 703, 708 (1983) ("where there is a conflict of interest between an insured and his insurer, the parties will not be estopped from litigating in a subsequent proceeding those issues as to which there was a conflict of interest, whether or not the insurer defended in the original tort claim"); *Spears v. State Farm Fire & Cas. Ins.*, 291 Ark. 465, 469, 725 S.W.2d 835, 837 (1987) (when the interests of the insured and the insurance company conflict, *res judicata* does not prevent a second suit); *Strickland v. Hughes*, 273 N.C. 481, 487, 160 S.E.2d 313, 318 (1968) (the insurer's action of defending its insured according to its contractual obligation does not estop the insurer from bringing a subsequent action alleging fraud or collusion).



appears to be the first to provide a detailed procedure for resolving the conflict of interests problem.<sup>205</sup> If other jurisdictions view this procedure with favor, *Allstate* could be an influential decision in the insurance liability field.

As *Brohawn* did, *Allstate* makes clear that a conflict of interest does not lessen the insurer's contractual duty to defend the insured and to pay any judgments within the policy's coverage.<sup>206</sup> Only when the insured party takes unfair advantage of the situation is the insurer entitled to relief. For example, if an insured fails to disclose facts, and this falsely brings the action within the insurance policy's coverage, then it is unfair to bind the insurer.<sup>207</sup>

The court's new procedure seems a reasonable solution to a difficult problem. Because the procedure delays intervention until after the trial court reaches its judgment, and relitigation is allowed only upon a finding that the trial court did not fairly litigate the coverage issue, the potential for prejudice to the insured is minimal. Furthermore, by requiring that the insurer act within ten days of the entry of judgment, the decision ensures that the trial judge, who is in the best position to do so, will rule on the insurer's allegations.

But the court's solution suffers from one procedural problem. The decision provides that when an insurer intervenes following entry of judgment based upon a jury verdict, the insurer may file a motion for judgment notwithstanding the verdict.<sup>208</sup> According to the Maryland Rules, the motion may be filed by a party "only if that party made a motion for judgment at the close of all the evidence and only on the grounds advanced in support of the earlier motion."<sup>209</sup> The insurer cannot satisfy this condition because it was not and could not have been a party at an earlier time. It is unclear whether the court intended to waive this requirement, or simply did not consider it.

4. *Conclusion.*—Fifteen years ago the Maryland Court of Appeals decided that a pre-trial declaratory judgment was inappropriate if the issue would be resolved in a pending tort trial.<sup>210</sup> In *Allstate*, the court refined that earlier ruling by establishing a procedure that protects the rights of all parties. By holding that a post-

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205. See *supra* note 193.

206. See 319 Md. at 261, 572 A.2d at 161.

207. See *id.* at 262, 572 A.2d at 161.

208. See *id.* at 264, 572 A.2d at 162; Md. R. 2-532.

209. Md. R. 2-532(a).

210. See *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975).

trial declaratory judgment action is appropriate to determine the litigation's fairness, the court protects the insurer from being bound in cases of fraud and collusion. The holding is consistent with existing Maryland law, and provides a necessary alternative to pre-trial declaratory judgment actions, or insurer intervention in the tort trial.

#### *D. Executive Immunity*

In *Mandel v. O'Hara*,<sup>211</sup> the Court of Appeals held that as a matter of common law, Maryland's governor enjoys absolute immunity from liability for damages for nonconstitutional torts caused by the legislative function of vetoing or approving legislation.<sup>212</sup> The court concluded that there is no difference between the discretion exercised by a governor performing the veto or approval function and the discretion legislators exercise in deciding when to vote for or against a bill.<sup>213</sup> The court also held that Governor Mandel could interlocutorily appeal the order denying his motion for summary judgment because review after final judgment did not protect his right to avoid trial.<sup>214</sup> This Note discusses the court's functional analysis,<sup>215</sup> and the sound reasoning underlying its narrow holding.

1. *The Case.*—James F. O'Hara and Michael P. O'Hara (the O'Haras), were stockholders in the Southern Maryland Agricultural Fair Association, Inc. (Marlboro), which owned the Marlboro race-track.<sup>216</sup> The O'Haras claimed that former Governor Marvin Mandel, and others, collectively known as the Kovens Group, practiced common-law deceit upon them in the December 31, 1971 sale of their Marlboro stock.<sup>217</sup>

Before, or during the Maryland General Assembly's 1971 ses-

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211. 320 Md. 103, 576 A.2d 766 (1990).

212. *See id.*

213. *See id.* at 118, 576 A.2d at 781.

214. *See id.*

215. In *Spalding v. Vilas*, 161 U.S. 483 (1896), the Supreme Court first held that in civil suits against executive officials, the title of the executive's office does not determine the applicable scope of immunity. Instead, the privilege depends on the particular function the executive is exercising. Whether a function deserves absolute immunity is an objective, rather than a subjective, determination. *See id.* at 498-99. The function at issue in this case was the governor's power to veto or approve legislation.

216. *O'Hara v. Kovens*, 305 Md. 280, 282, 503 A.2d 1313, 1315 (1986). The O'Haras' combined holdings constituted approximately 30% of Marlboro's then outstanding stock. *Id.* On December 31, 1971, the O'Haras, together with others who held an additional 52% of the outstanding stock, sold 82% of Marlboro's stock. *Id.*

217. *See Mandel*, 320 Md. at 105-06, 576 A.2d at 767.

sion, Marlboro and Hagerstown, two entities that conducted horse racing with parimutuel betting, agreed that Hagerstown would sell eighteen of its racing days to Marlboro.<sup>218</sup> As a result, Marlboro would benefit from thirty-six days of racing. Marlboro and Hagerstown needed legislative approval during either the 1971 or 1972 session of the Maryland General Assembly to transfer the Hagerstown days. House Bill 1128, enacted at the 1971 legislative session, conferred the necessary approval. On May 28, 1971, then-Governor Mandel vetoed the bill. Subsequently, the plaintiffs sold their Marlboro stock. On January 12, 1972, the General Assembly overrode the veto. In December 1972, Marlboro merged with another corporation that conducted horse racing with parimutuel betting at the Bowie racetrack. On November 24, 1975, the federal government filed indictments against Governor Mandel and others of the Kovens Group.<sup>219</sup>

In 1978, the O'Haras filed suit alleging that there was a conspiracy between Governor Mandel and others of the Kovens Group that antedated Mandel's veto of House Bill 1128. The essence of the conspiracy was to have the Governor's veto depress the stock's value; to acquire the stock at a depressed price; and to restore its value by having Governor Mandel induce the General Assembly to override the veto.<sup>220</sup>

After the defendants were denied judgment on limitations grounds,<sup>221</sup> Governor Mandel moved for summary judgment on the grounds that absolute immunity protected his official actions from liability.<sup>222</sup> The trial court denied the motion, and Governor Mandel appealed to the Court of Special Appeals. That court granted a stay, and he petitioned the Court of Appeals, which granted certiorari, to determine the question of applicable immunity, and to decide whether the order denying the motion for sum-

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218. *Id.*

219. *Id.* The indictment charged that Mandel acted "with intent to aid and assist certain legislation and legislative matters financially beneficial [] to the other codefendants in their capacities as alleged owners of the Marlboro Race Track." *United States v. Mandel*, 415 F. Supp. 1025, 1030 (D. Md. 1976).

220. *See Mandel*, 320 Md. at 105-06, 576 A.2d at 767.

221. *See O'Hara v. Kovans*, 305 Md. 280, 503 A.2d 1313 (1986) (the question of when plaintiffs in a securities fraud action were on notice was a question of fact for the jury). For a history of the prosecution on federal criminal charges, see *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976) (summarizing indictment); *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979) (reversing convictions), *vacated on reh'g*, 602 F.2d 653 (4th Cir.) (affirming convictions by evenly divided en banc court), *further en banc reh'g denied*, 609 F.2d 1076 (1979), *cert. denied*, 445 U.S. 961 (1980).

222. *Mandel*, 320 Md. at 107, 576 A.2d at 768.

mary judgment was appealable.<sup>223</sup>

2. *Legal Background and The Court's Reasoning.*—"Absolute immunity is appropriate when the threat of liability may bias the decisionmaker in ways that are adverse to the public interest."<sup>224</sup> Traditionally, this defense has been available to judges<sup>225</sup> and legislators<sup>226</sup> when their acts are "judicial" or "legislative" in nature, and within the scope of their jurisdiction.<sup>227</sup> The law has not been as clear, however, with regard to executive officials.<sup>228</sup>

Absolute immunity removes from judicial scrutiny all acts com-

223. *See id.*

224. *Nixon v. Fitzgerald*, 457 U.S. 731, 788 (1981) (White, J., dissenting) (the Constitution confers on the President of the United States absolute immunity from damages liability predicated on his official acts).

225. *See Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967) (Section 1983 suits did not invalidate the absolute immunity awarded to state judges); *see also Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 350 (1871) (judges are not liable for their judicial acts in civil suits); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity must be accorded state prosecutors with respect to the initiation and pursuit of prosecutions).

226. *See Tenney v. Brandhove*, 341 U.S. 367 (1951). In granting absolute immunity to state legislators, the Court explained the privilege's history:

The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries . . . . Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution . . . . The reason for the privilege is clear. . . . "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence."

*Id.* at 372-73 (quoting 2 WORKS OF JAMES WILSON 38 (Andrews ed. 1896)).

227. *See generally* W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 132, at 1056-57 (5th ed. 1984) [hereinafter PROSSER]; *see also* RESTATEMENT (SECOND) OF TORTS § 895D comment c (1979) (a judge or legislator "is not liable for [that official's] discretionary acts or omissions even though [the official] is found to have acted with malicious or other improper motives").

228. The common law did not distinguish between public officials and private citizens in suits for personal tort liability. *See* 5 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 29.8, at 653-54 (2d ed. 1986). The development of public official immunity has expanded, however, and now, "[a] high-level executive officer is usually accorded the same type of immunity as that given the judge and for the same reasons." RESTATEMENT (SECOND) OF TORTS § 895D comment d (1979). In addition, Prosser explained:

The judicial immunity is not granted wholesale to officials of the executive departments, who normally enjoy only a qualified immunity if any at all. . . . [T]he dominant approach seems to follow the "functional analysis," and the absolute immunity is granted or denied according to whether the officer's functions are judicial in nature.

mitted in the discharge of official duties. The official's underlying motives are not subject to judicial review.<sup>229</sup> This doctrine rests on the principle that executive officials will be unable properly to administer public affairs if they perform their duties under the fear of damage suits for acts done in the course of their official duties.<sup>230</sup> To avoid inhibiting the "fearless, vigorous, and effective administration of policies of government,"<sup>231</sup> the executive official cannot be subject to the restraint accompanying judicial inquiry into the motives that control his conduct.<sup>232</sup> Hence, the principle evolved that it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."<sup>233</sup>

a. *Executive Official Immunity in Maryland.*—The Court of Appeals has never had occasion to decide whether absolute immunity protects the Governor of Maryland in civil suits,<sup>234</sup> but it has confronted the issue in cases involving state officials of lesser rank.<sup>235</sup> In *Walker v. D'Alesandro*,<sup>236</sup> the court considered whether absolute immunity protected the Mayor of Baltimore City.<sup>237</sup> The court stated: "We may assume, without deciding, that the privilege does

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PROSSER, *supra* note 227, § 132, at 1056-58. See *infra* notes 245-267 and accompanying text.

229. See *Spalding v. Vilas*, 161 U.S. 483, 498-99 (1896). Qualified immunity, on the other hand, protects officials only if the executive acted in good faith or had reasonable grounds to believe that his conduct would not violate another individual's constitutional rights. See *Wood v. Strickland*, 420 U.S. 308, 313-22 (1975).

230. See *Barr v. Mateo*, 360 U.S. 564, 571 (1959).

231. *Id.*

232. See *Spalding*, 161 U.S. at 498-99; see also *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). Judge Learned Hand stated in *Gregoire*: "Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith." *Id.*

233. *Id.*

234. See *Mandel*, 320 Md. at 113, 576 A.2d at 768.

235. See, e.g., *Robinson v. Board of County Comm'rs for Prince George's County*, 262 Md. 342, 278 A.2d 71 (1971) (defense of governmental immunity extends to police officers' nonmalicious acts performed within the scope of their law enforcement function); *Clark v. Ferling*, 220 Md. 109, 151 A.2d 137 (1959) (the superintendent of the Maryland State Reformatory for Males was a public officer whose duties in safely confining inmates involved the exercise of discretion and, thus, immunity from liability for injuries inflicted by one prisoner upon another); *Cocking v. Wade*, 87 Md. 529, 40 A. 104 (1898) (a sheriff is not civilly liable for injury to a prisoner if, in the honest exercise of discretion, he fails to remove a prisoner in time to avert a threatened danger).

236. 212 Md. 163, 129 A.2d 148 (1957).

237. See *id.*

apply . . . .”<sup>238</sup> The court in that case did not have to decide the question because the Mayor’s conduct exceeded the scope of his authority.<sup>239</sup> Nevertheless, the court noted that absolute immunity is accorded to “judicial . . . and to legislative proceedings and to the activities of high executive officers . . . .”<sup>240</sup>

In most instances involving lesser executive officials, however, Maryland courts have permitted only qualified immunity. In *Carr v. Watkins*,<sup>241</sup> the Court of Appeals held that qualified immunity, rather than absolute immunity, appropriately protected Montgomery County police officers against tort liability.<sup>242</sup> In another action against two police officers, the Maryland Court of Appeals in *Robinson v. Board of County Commissioners for Prince George’s County*<sup>243</sup> reaffirmed the rule in *Carr*, and found no reason why a public official should not be liable for malicious actions performed within the official’s discretionary authority.<sup>244</sup>

b. *Supreme Court Rulings on Executive Immunity.*—The Supreme Court has consistently recognized that high-level executive officials are entitled to some degree of immunity from civil suits. In *Spalding v. Vilas*,<sup>245</sup> it granted absolute immunity to all cabinet-level officials who acted within the scope of their authority.<sup>246</sup> *Spalding* involved a suit for damages against the Postmaster General, alleging that he maliciously circulated to other postmasters false information that ul-

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238. *Id.* at 170, 129 A.2d at 151.

239. *See id.* at 173, 129 A.2d at 153. In *Walker*, the plaintiff, an artist, brought an action against the Mayor of Baltimore alleging wrongful removal of one of his paintings from an art exhibit at a museum, interference with contractual relations, slander and libel. *See id.* at 166-67, 129 A.2d at 149-50. The court concluded that the mayor’s powers did not extend to “censorship of works of art.” *Id.* at 171, 129 A.2d at 152.

240. *Id.* at 170, 129 A.2d at 151.

241. 227 Md. 578, 177 A.2d 841 (1962).

242. *See id.* A federal security officer and two county police officers were charged with transmitting certain information to the plaintiff’s employer, and this led to the plaintiff’s dismissal. *See id.* at 581, 177 A.2d at 842. The court refused to extend absolute immunity to the two county police officers, reasoning that it has been reluctant to grant the privilege to officials of a higher rank than these defendants. *See id.* at 585-86, 177 A.2d at 844-45. As authority, however, the court cited *Walker*, in which it specifically indicated that absolute immunity applied to high executive officials. *See id.*; *supra* notes 238-240 and accompanying text.

243. 262 Md. 342, 278 A.2d 71 (1971).

244. *See id.* at 348, 278 A.2d at 74.

245. 161 U.S. 483 (1896).

246. *See id.* at 498. The scope of authority was limited to any action “having more or less connection with the general matters committed by law to [the officer’s] control or supervision.” *Id.*

timately harmed the plaintiff.<sup>247</sup> Finding that the Postmaster General acted within the scope of his authority, the Court awarded him absolute immunity.<sup>248</sup>

The Court's decision in *Barr v. Mateo*<sup>249</sup> extended the rule established in *Spalding* to other federal officials,<sup>250</sup> and reaffirmed that "[i]t is not the title of his office but the duties . . . [of] the particular officer"<sup>251</sup> that determines whether immunity will protect the executive official.<sup>252</sup> In *Barr*, two employees suspended for misconduct sued the acting director of the Office for Rent Stabilization, charging the Director with malicious defamation for informing the press of their suspensions.<sup>253</sup> Finding that the press conference was within the "outer perimeter of [his] line of duty,"<sup>254</sup> the Court reasoned that absolute immunity protected the official from liability despite the allegations of malice.<sup>255</sup>

In 1974, the Court in *Scheuer v. Rhodes*<sup>256</sup> narrowed its reasoning and restricted absolute immunity in section 1983 actions.<sup>257</sup> In *Scheuer*, the Court refused to allow the Governor of Ohio the defense of absolute immunity for his discretionary actions during an anti-war demonstration at Kent State University.<sup>258</sup> The Court decided that only qualified immunity was available to state executive officials sued for federal constitutional violations.<sup>259</sup> *Wood v. Strickland*<sup>260</sup> reaffirmed that an official acting in bad faith would be denied immunity from liability for constitutional violations, but also denied immunity, regardless of the official's intentions or good faith, if the official reasonably should have known that his act would violate an

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247. *See id.* at 484-86.

248. *See id.* at 498.

249. 360 U.S. 564 (1959).

250. *See id.* at 572-73.

251. *Id.* at 573.

252. *See id.* at 573-74; *Spalding*, 161 U.S. at 498.

253. *See Barr*, 360 U.S. at 566-68.

254. *Id.* at 575.

255. *See id.*

256. 416 U.S. 232 (1974).

257. 42 U.S.C. § 1983 (1988).

258. *See Scheuer*, 416 U.S. at 238-49.

259. *See id.* at 247. The legislative and the judicial branches of state governments already enjoyed absolute immunity for both constitutional and common law claims. *See Pierson v. Ray*, 386 U.S. 547 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951). The *Scheuer* Court reasoned that section 1983 would serve no purpose if state executive officials were granted absolute immunity. The Court also compared the governor's function to a police officer's exercise of discretion in possible arrest situations, and noted that police officers traditionally have been awarded only qualified immunity. *See Scheuer*, 416 U.S. at 244-49.

260. 420 U.S. 308 (1975).

individual's constitutional right.<sup>261</sup>

Narrowing the standard developed in *Scheuer*, the Court in *Butz v. Economou*,<sup>262</sup> reconciled its prior holdings and supplied the principles that now govern immunity privileges for executive officials. *Butz* established the general rule that like state officials, federal officials have only a qualified immunity in suits for constitutional violations,<sup>263</sup> but stated that "there are some officials whose special functions require a full exemption from liability."<sup>264</sup>

Four years later, in *Nixon v. Fitzgerald*,<sup>265</sup> the Court followed the principles governing the functional analysis, and held that the President was absolutely immune from civil liability for all conduct within the scope of his authority.<sup>266</sup> The Court concluded that this broad application of absolute immunity was "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."<sup>267</sup>

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261. *See id.* at 321-22.

262. 438 U.S. 478 (1978).

263. *See id.* *Butz* was a "*Bivens*" action. In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 395-97 (1971), the Court awarded damages to a plaintiff who alleged that federal narcotics agents violated his fourth amendment rights by conducting a warrantless search of his residence. Although section 1983 allows a cause of action to plaintiffs deprived of constitutional rights by a state executive official, *Bivens* held that the Constitution affords a similar right against federal executive officials. *See* 403 U.S. at 397. In *Butz*, Department of Agriculture officials were sued by a commodity futures commission merchant who alleged that the unauthorized proceedings instituted against him violated his constitutional rights. *See* 438 U.S. at 481-83. The court upheld the absolute immunity claim for those officials performing quasi-judicial functions. *See id.* at 512-14. Thus, the privilege awarded to officials involved in judicial proceedings was equally appropriate for executives performing similar adjudicatory functions, such as the administrative agency proceedings at issue in *Butz*. *See id.* at 513-17.

264. *Butz*, 438 U.S. at 508. The *Butz* Court reconciled its holding with the rules established in *Spalding* and *Barr* by stating that when a federal official violates a constitutional right, the officer has overstepped the bounds of official authority. *See id.* at 485-96. This decision implies a distinction between common law and constitutional claims against federal executive officials. By not overruling *Barr*, absolute immunity is still the rule for common law tort claims. Although *Butz* did not overrule *Spalding* either, it restricted the available level of immunity. *See id.*

265. 457 U.S. 731 (1981).

266. *See id.*

267. *Id.* at 749. The dissent in *Nixon* argued that the Court has "abandoned" the functional approach. Justice White stated: "Indeed, the majority turns this rule on its head by declaring that because the functions of the President's office are so varied and diverse . . . the office is unique and must be clothed with officewide, absolute immunity." *Id.* at 770 (White, J., dissenting).



c. *Legislative Character of the Veto or Approval Function.*—In *Hernandez v. City of Lafayette*,<sup>268</sup> the United States Court of Appeals for the Fifth Circuit held that a mayor enjoys absolute immunity from damages for an alleged tort based upon the exercise of veto power.<sup>269</sup> In that case, the plaintiff owned land through which the municipality planned to build a highway.<sup>270</sup> The mayor vetoed the city council's decision to rezone the land, and the council did not override it.<sup>271</sup> The plaintiff claimed that the decision to rezone was delayed to keep the value of the land depressed, and therefore lessen the cost of acquiring the right of way for the highway.<sup>272</sup>

The *Hernandez* court held that the mayor was entitled to absolute immunity from suit for acts performed in a legislative capacity.<sup>273</sup> The court reasoned that "[t]he mayor's veto, like the veto of the President or a state governor, is undeniably a part of the legislative process. It differs only in that it takes place on the local level."<sup>274</sup> The First,<sup>275</sup> Sixth,<sup>276</sup> Seventh,<sup>277</sup> and Eleventh<sup>278</sup> Circuits followed *Hernandez*' holding and conferred on the executive veto absolute legislative immunity to section 1983 actions.

d. *The Court's Reasoning.*—In an opinion by Judge Rodowsky, the Court of Appeals in *Mandel* found that the civil immunity applicable to the gubernatorial veto or approval function is as complete as the immunity enjoyed by General Assembly members when performing their legislative function.<sup>279</sup> This decision gives the governor immunity from judicial scrutiny of the motives underlying

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268. 643 F.2d 1188, *reh'g denied*, 649 F.2d 336 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

269. *See id.* at 1193.

270. *See id.* at 1190-91.

271. *Id.*

272. *See id.*

273. *See id.* at 1193-94.

274. *Id.* at 1194.

275. *See Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984) (the absolute immunity extended to the executive veto does not protect members of a town planning board from damage suits).

276. *See Shoultes v. Laidlaw*, 886 F.2d 114 (6th Cir. 1989) (local legislators who voted for a zoning ordinance that was later declared invalid are protected by absolute immunity in a subsequent civil rights action against them).

277. *See Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983) (the president and other trustees of a village board of trustees were entitled to absolute immunity for legislative action in reducing the number of village liquor licenses).

278. *See Healy v. Pembroke Park*, 831 F.2d 989 (11th Cir. 1987) (the mayor and municipal commissioners were legislatively immune from liability to discharged policemen suing under a federal civil rights provision).

279. *See* 320 Md. at 105, 576 A.2d at 766.

decisions to veto or approve legislation.<sup>280</sup> The court decided that exercise of the veto power is, in essence, a legislative function.<sup>281</sup> Because the common law has granted absolute immunity to legislators for public policy reasons,<sup>282</sup> the court decided that there is no reason why this defense should be unavailable to a governor exercising the legislative decision-making power inherent in the veto or approval function.<sup>283</sup>

Presented with this question for the first time, the court confined its holding on the issue of immunity to the narrow point of "intersection or overlap" between executive and legislative powers.<sup>284</sup> Consequently, the court rejected the O'Haras' argument that if the veto power was treated as a legislative action, this would violate the separation of powers doctrine.<sup>285</sup> In the court's view, a partial overlap of the legislative, executive, and judicial powers is entirely reasonable, and even necessary for special purposes such as a governor's exercise of the veto power.<sup>286</sup>

The court also rejected the O'Haras' additional claim that a governor cannot assert absolute immunity unless he "exercises all of the state's legislative power on the subject matter at issue."<sup>287</sup> The court reasoned that if legislative immunity were predicated on an exercise of a state's entire legislative authority, then "legislators themselves would never have immunity in any state in which legislative power is shared under a constitutional requirement that the Governor either sign or veto legislative enactments."<sup>288</sup>

280. *See id.*

281. *See id.* at 133-34, 576 A.2d at 781.

282. *See* U.S. CONST. art. 1, § 6 (speech or debate clause of the federal Constitution grants congressmen and their aides immunity for conduct within the scope of their legislative function); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (absolute immunity granted to state legislators); *supra* note 226 and accompanying text.

283. *See Mandel*, 320 Md. at 134, 576 A.2d at 781.

284. *See id.* at 125, 576 A.2d at 777. Governor Mandel argued that the governor's veto power is a legislative function. *Id.* at 108, 576 A.2d at 768.

285. *See id.* at 129, 576 A.2d at 779. The O'Haras made this argument in specific reference to the separation of powers as embodied in the Maryland Declaration of Rights, art. 8, which states:

That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

*See* 320 Md. at 129 n.9, 576 A.2d at 779 n.9.

286. *See id.*

287. *Id.* at 130, 576 A.2d at 779. To make this claim, the O'Haras relied on *England v. Rockefeller*, 739 F.2d 140, 142-43, *rev'd on other grounds sub nom. Young v. Lynch*, 846 F.2d 960, 962 (4th Cir. 1984). *See* 320 Md. at 130, 576 A.2d at 779.

288. *Mandel*, 320 Md. at 132, 576 A.2d at 780.

Essentially, the court decided that legislators' discretion in voting for or against a bill does not differ from a governor's discretion in deciding whether to approve or veto legislation.<sup>289</sup> Once the court reached this conclusion, it held that absent public policy reasons, there was no basis for granting legislators absolute immunity to vote for or against legislative acts while denying it to governors engaged in making identical judgments.<sup>290</sup>

The court also reasoned that because review after final judgment would not protect Governor Mandel's right to avoid trial, his interlocutory appeal was appropriate.<sup>291</sup> From a procedural standpoint, the court viewed the Governor's assertion of absolute immunity to be the same as a defense of failure to state a claim upon which relief can be granted.<sup>292</sup> Furthermore, because that defense may be asserted in a motion for summary judgment, it is not waived, even if first made at trial on the merits.<sup>293</sup> Although Governor Mandel did not argue at the trial that the veto is a legislative function, the court reasoned that it would be "inefficient to remand" because the parties have already presented this "pure point of law" to this court.<sup>294</sup>

3. *Analysis.*—The court's decision to grant the governor absolute immunity for his exercise of the veto power was one of first impression in Maryland. It approved absolute immunity for legislative acts performed by a governor in civil suits for nonconstitutional torts.<sup>295</sup> The decision is important because it applies a functional analysis to questions of executive official immunity.<sup>296</sup> The court reached its result by adhering to precedent and principles used by federal courts in determining the scope and credibility of an absolute immunity defense.<sup>297</sup> With these in mind, the court found the

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289. *See id.* at 133-34, 576 A.2d at 781.

290. *See id.*

291. *See id.*; *see also* Public Serv. Comm'n v. Patuxent Valley Conservation League, 300 Md. 200, 477 A.2d 759 (1984).

292. *See* 320 Md. at 134, 576 A.2d at 781.

293. *See id.* Specifically, the defense will not be waived under Md. R. 2-324.

294. *See id.*

295. The court specifically noted that the holding does not address criminal proceedings, claims for equitable relief, declaratory judgment, restitution, or for damages based on an alleged constitutional violation. *See id.* at 134 n.11, 576 A.2d at 781 n.11.

296. *Butz* set forth the correct test: an official's absolute immunity should extend only to acts in performance of particular functions of his office. *See Butz v. Economou*, 438 U.S. 478, 508-12 (1978).

297. *See supra* notes 245-267 and accompanying text. In *Nixon*, the Supreme Court explained that "[o]ur decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and his-

Governor's veto power among those "special functions" deserving absolute immunity addressed by the Supreme Court in *Butz*.<sup>298</sup>

*a. Importance of the Functional Approach.*—The court could have recognized that a governor is protected from liability for all torts by a general rule of absolute immunity, or a general rule of qualified immunity.<sup>299</sup> Instead, the court followed federal court decisions and applied a functional analysis to determine the scope and credibility of a governor's immunity defense.<sup>300</sup>

The federal cases held that the defense's scope varied in proportion to the nature of the executive official's functions, and the range of decisions that the official may be required to make within that function.<sup>301</sup> This "functional approach" required continued recognition of absolute immunity for the especially sensitive responsibilities of certain officials—namely judges, prosecutors, legislators, and those executive officials engaged in analogous functions.<sup>302</sup>

By using a functional analysis to examine questions of executive immunity, the court implicitly refused to award blanket immunity to a high-level official, yet also recognized that qualified immunity will not adequately serve all the public interests at stake.<sup>303</sup> Specifically, the court's adoption of a functional approach allowed it to balance the public's interest in the governor's uninhibited exercise of the veto function, and the interests of individuals harmed by the execu-

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tory." *Nixon v. Fitzgerald*, 457 U.S. 731, 747 (1981). In addition, Supreme Court decisions granting immunity to executive officials rest in part on judicial conclusions as to what privileges are necessary if a certain function is to be performed in the public interest. See *id.* at 747-48.

298. See *Mandel*, 320 Md. at 133-34, 576 A.2d at 781. *Butz* held that although federal officials generally will have a qualified immunity for nonconstitutional torts, absolute immunity will be extended to certain "special functions" when it is shown that exposure to liability is inconsistent with the proper performance of the official's duties. See *Butz*, 438 U.S. at 508-15.

299. See *supra* notes 234-244 and accompanying text. The court noted that "[t]he decisions of this Court neither compel nor foreclose the conclusion that a Governor of Maryland has an absolute civil immunity when vetoing or approving legislation." *Mandel*, 320 Md. at 113, 576 A.2d at 768. See also Md. CTS. & JUD. PROC. CODE ANN. § 5-399.2(b) (Supp. 1990).

300. See *supra* notes 245-267 and accompanying text.

301. Thus, a proper analysis is not simply to ask whether an action is within the official's constitutional and statutory duty, but rather to determine if the act falls within the judicial, legislative, or prosecutorial functions to which absolute immunity attaches.

302. See *Nixon v. Fitzgerald*, 457 U.S. 731, 746-47 (1981).

303. In *Scheuer*, the Supreme Court noted that throughout the development of executive immunity, one policy consideration underlies the analysis: "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974).

tive's tortious acts, committed maliciously or in bad faith.<sup>304</sup>

This ruling did not draw novel functional lines. Because the veto power is at the center of a governor's duties, the immunity has not been extended to an area outside the perimeter of the governor's responsibility or of his traditional role in the legislative process.<sup>305</sup> Furthermore, the decision does not deprive the public of its own power to deter possible future misconduct by those elected to legislative positions. As the Supreme Court in *Tenney v. Brandhove*<sup>306</sup> pointed out: "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."<sup>307</sup> Similar reasoning applies to the governor's exercise of veto power, correctly deemed "legislative" in nature.

*b. Guidance for Maryland Courts.*—Although the holding is confined narrowly to the facts, the decision provides guidance for Maryland courts faced with immunity questions involving high-level executive officials. Maryland courts will know to examine the specific circumstances and acts underlying liability claims, and determine whether the effective administration of government would be impaired if the executive must perform the particular function without absolute immunity.<sup>308</sup> In this way, courts will be able to take a reasoned balancing approach to the policies and issues involved before determining the scope of immunity.<sup>309</sup>

*4. Conclusion.*—Had the court refused to grant absolute immunity, any citizen injured by a gubernatorial veto—or approval—

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304. "Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed . . . do not fully and faithfully perform the duties of their offices." *Scheuer*, 416 U.S. at 241-42. Moreover, the theory of absolute immunity assumes that officials may err, but decides that "it is better to risk some error and possible injury from such error than not to decide or act at all." *Id.* at 242.

305. See *supra* note 226 and accompanying text.

306. 341 U.S. 367 (1951).

307. *Id.* at 378.

308. The most noted policy considerations for justifying absolute immunity are: the injustice of subjecting to liability an official who is obligated to perform discretionary functions; and the danger that officials, when threatened by personal liability, would be less willing to make decisions with the decisiveness and the judgment required for the public good. See *supra* notes 224-233 and accompanying text.

309. This approach seems more reasonable than simply applying a blanket immunity or a qualified privilege to a high-level official based on that official's office before considering the function involved.

would be free to bring a civil suit for damages alleging improper motive. The governor's decisions would be subject to constant judicial review, questioning their underlying motives. In the court's view, this result would be more costly than leaving open the possibility that the governor's malicious conduct would go unredressed.<sup>310</sup> As Chief Justice Burger stated in *Nixon*, "[w]hen litigation processes are not tightly controlled—and often they are not—they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage."<sup>311</sup> Because the functional analysis of immunity questions reconciles the conflicting interests at stake, the court properly viewed private interests within the broader perspective of the state's political system.

*E. Punitive Damages Awards May Include Attorney Fees*

In *St. Luke Evangelical Lutheran Church v. Smith*,<sup>312</sup> a divided Court of Appeals held that a jury may consider attorney fees in fixing a punitive damages award.<sup>313</sup> The court reasoned that this is proper because it will aid the jury in calculating the punitive damage award, and the plaintiff "can be made truly whole in . . . cases in which the defendant's wrongful conduct is found to be at its most flagrant."<sup>314</sup> Thus, *St. Luke* expands Maryland law by adopting a limited exception to the "American rule" that parties to a lawsuit must pay their own attorney fees.<sup>315</sup> The case may also signal the beginning of an effort by the court to provide to juries greater guidance concerning the size of punitive damage awards.

1. *The Case.*—Ginny Ann Smith was employed as the associate director of youth ministry at St. Luke Evangelical Lutheran Church.<sup>316</sup> One day while Ms. Smith was away, Assistant Pastor David Buchenroth discovered a file in her office containing personal correspondence to Ms. Smith from Assistant Pastor David Shaheen,

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310. See *Mandel*, 320 Md. at 133-34, 576 A.2d at 781.

311. *Nixon v. Fitzgerald*, 457 U.S. 731, 763 (1981).

312. 318 Md. 337, 568 A.2d 35 (1990).

313. See *id.* at 339, 568 A.2d at 36. Judge Blackwell wrote the court's opinion, and was joined by Judges Eldridge, Cole, and Adkins. Judge Rodowsky dissented, joined by Chief Judge Murphy and Judge McAuliffe. See *id.* at 337, 568 A.2d at 35.

314. *Id.* at 354, 568 A.2d at 43.

315. See *id.* at 337-38, 568 A.2d at 35-36; *infra* notes 330-351 and accompanying text for a discussion of the American rule.

316. *St. Luke*, 318 Md. at 339, 568 A.2d at 36. Ms. Smith also volunteered as administrative assistant for the church's traveling drama group. Pastor Shaheen directed the group. *Id.*

also of St. Luke.<sup>317</sup> Pastor Buchenroth read the letters and notes in the file, and concluded that Pastor Shaheen and Ms. Smith were involved in a sexual relationship.

Pastor Buchenroth told several church members, including Pastor Shaheen's wife, that he believed Pastor Shaheen and Ms. Smith were having an affair.<sup>318</sup> After reviewing the correspondence and discussing the matter with her husband, Mrs. Shaheen told Pastor Buchenroth that she did not believe that her husband and Ms. Smith were sexually involved.

Pastor Buchenroth professed to accept Mrs. Shaheen's conclusion, apologized to Ms. Smith and Pastor Shaheen for the pain he had caused them, and promised to keep his earlier suspicions confidential. Despite his promise, however, Pastor Buchenroth repeated his original allegations to other church members. Most of the congregation soon knew about Pastor Buchenroth's allegations.<sup>319</sup> Subsequently, the church dismissed Ms. Smith.

Ms. Smith brought a defamation and invasion of privacy suit against St. Luke and Pastor Buchenroth in the Circuit Court for Montgomery County. The jury returned a verdict for Ms. Smith, and awarded her \$228,904 in compensatory damages, and punitive damages in the amount of \$105,875 against St. Luke, and \$2000 against Pastor Buchenroth.<sup>320</sup> The jury found that, when Pastor Buchenroth repeated his allegations after promising not to, he acted with malice while acting within the scope of his employment.<sup>321</sup> The court permitted the jury to consider Ms. Smith's attorney fees of \$68,441 in determining the amount of punitive damages to award her.<sup>322</sup>

Both defendants appealed.<sup>323</sup> The Court of Special Appeals reversed the judgment against St. Luke, holding that the Circuit Court erroneously allowed Ms. Smith double the permitted number of peremptory challenges.<sup>324</sup> The court affirmed the judgment against

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317. *Id.* at 340-41, 568 A.2d at 36-37. Ms. Smith and Pastor Shaheen were then traveling on a church sponsored trip to the Holy Land. *Id.*

318. *Id.* Pastor Buchenroth showed the correspondence to Mrs. Shaheen, told his allegations to Ms. Smith's mother, and expressed his opinion that Pastor Shaheen and Ms. Smith might not return from the church excursion. *Id.*

319. *Id.* Ms. Smith received "unsettling telephone calls and mail from members of the congregation." *Id.*

320. *Id.*

321. *St. Luke Evangelical Church, Inc. v. Smith*, 74 Md. App. 353, 355, 537 A.2d 1196, 1197 (1988), *rev'd*, 318 Md. 337, 568 A.2d 35 (1990).

322. *St. Luke*, 318 Md. at 341-42, 568 A.2d at 37.

323. *Id.* at 341, 568 A.2d at 37.

324. 74 Md. App. at 366, 537 A.2d at 1202. Maryland Rule of Procedure 2-512(h)

Buchenroth.<sup>325</sup>

Ms. Smith petitioned the Court of Appeals for certiorari on the peremptory strike issue. St. Luke also petitioned for certiorari, arguing that the circuit court erroneously permitted the jury to consider Ms. Smith's attorney fees in setting the punitive damages award.<sup>326</sup> The Court of Appeals granted both petitions for certiorari.<sup>327</sup> The court reversed the Court of Special Appeals' decision as to St. Luke's liability,<sup>328</sup> and reinstated the compensatory and punitive damage awards.<sup>329</sup>

## 2. *Legal Background.*—

*a. The American Rule.*—The American rule, under which parties pay their own legal fees, is the prevailing rule in the United States.<sup>330</sup> By contrast, the English rule allows the successful party to

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permits each party four peremptory challenges, and treats coplaintiffs and codefendants as a single party, unless they have adverse interests, in which case they each may be allowed as many as four peremptory strikes each. *See* MD. R. 2-512(h). The trial judge properly granted each codefendant four strikes, after finding a " 'potential' for conflict between the two codefendants," *St. Luke*, 318 Md. at 343, 568 A.2d at 37, but in an attempt to be "fair," improperly gave Ms. Smith an additional four strikes for a total of eight. *Id.*

The Court of Special Appeals reversed the trial court's judgment against St. Luke on this ground. It did not reverse the judgment against Pastor Buchenroth because he failed to preserve the peremptory challenge issue for review. *See* 74 Md. App. at 366, 537 A.2d at 1202.

325. 74 Md. App. at 376, 537 A.2d at 1207.

326. *See* 318 Md. at 341-42, 568 A.2d at 37. Buchenroth did not petition the Court of Appeals from the adverse decision of the Court of Special Appeals. *See id.* at 342, 568 A.2d at 37.

327. *See* *St. Luke Evangelical Lutheran Church v. Smith*, 313 Md. 9, 542 A.2d 845 (1988).

328. The Court of Appeals held that granting additional strikes to Ms. Smith "presented no significant deviation from prescribed procedure," 318 Md. at 344, 568 A.2d at 38, and therefore reversal was only appropriate upon a showing of prejudice. *Id.* *But cf.* *King v. State Roads Comm'n*, 284 Md. 368, 371, 396 A.2d 267, 269 (1979) (significant deviation that impairs or denies peremptory challenge privilege ordinarily requires reversal even without a showing of prejudice). No prejudice was proven because the jury strike list showing how many strikes Ms. Smith actually used was not in the record. *See St. Luke*, 318 Md. at 344, 568 A.2d at 38. The court consequently held that the error, if any, of allowing Ms. Smith eight peremptory strikes was harmless. *See id.*

329. *See id.* at 354, 568 A.2d at 43.

330. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). In some states, statutes have modified the American rule's observance. For example, in Alaska, the court may at its discretion award attorney fees to a prevailing party. *See* ALASKA STAT. § 09.60.010 (1986). Another Alaska statute requires trial courts to award attorney fees to a prevailing plaintiff in an action for damages when the amount claimed is \$1000 or less. *See id.* § 09.60.015(a) (1973). Oregon has a similar statute. *See* OR. REV. STAT. § 20.080 (1977). Nevada courts have discretion to award attorney fees in



recover attorney fees from the losing party.<sup>331</sup> The English rule originated in 1275, when a statute was enacted providing for recovery of attorney fees by successful plaintiffs.<sup>332</sup> In England, the right to recover attorney fees was extended to successful defendants in 1607.<sup>333</sup>

The American rule's history is difficult to trace.<sup>334</sup> It is unclear whether the American colonies adopted the English rule and then abandoned it, or whether the English rule was never used in this country.<sup>335</sup> Although it is likely that the English rule was used to some extent in colonial America, it did not gain widespread acceptance, and the American rule replaced it soon after the American Revolution.<sup>336</sup> Commentators have suggested that the individualistic attitudes of early Americans<sup>337</sup> and the distrust they felt for lawyers contributed to the American rule's development.<sup>338</sup>

In 1796, the Supreme Court adopted the American rule in *Archambel v. Wiseman*.<sup>339</sup> The Court reversed a lower federal court's \$1,600 award to the plaintiff for attorney fees, stating that "the general practice of the United States is in opposition to [awarding attor-

actions involving \$10,000 or less. See NEV. REV. STAT. § 18.010 (1967). See Note, *Theories of Recovering Attorney's Fees: Exceptions to the American Rule*, 47 UMKC L. REV. 566, 585 (1979).

331. See C. McCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 60 (1935) (the court has discretion to award costs; under the English system, costs include court fees, attorneys' fees, and other expenses associated with preparing for trial). The United States is one of the few countries in the world that observes the American rule. Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1223-24 (1967). See also McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761, 782 (1972) ("[America] is probably alone in failing to allow counsel fees to the victorious litigant."). Japan follows the American rule, but it allows fee shifting in favor of prevailing tort plaintiffs. Rowe, *The Legal Theory of Attorney Fee Shifting, A Critical Overview*, 1982 DUKE L.J. 651, 651 n.1.

332. Goodhart, *Costs*, 38 YALE L.J. 849, 852 (1929).

333. *Id.* at 853.

334. See Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 9 (1984) (tracing the history of the American rule of costs from colonial America to the present). See also Goodhart, *supra* note 332 (comprehensive account of the English rule's history).

335. See Note, *supra* note 330, at 567 (discussing the history of fee shifting).

336. *Id.*

337. See *id.* In colonial times, laymen often tried their own cases, and this eliminated the need for recovery of attorney fees. See also Comment, *A Giant Step Backwards: Alyeska Pipeline Service Co. v. Wilderness Society and Its Effect on Public Interest Litigation*, 35 MD. L. REV. 675, 681 (1976).

338. See Comment, *supra* note 337, at 681. "In every one of the colonies, practically throughout the Seventeenth Century, a lawyer . . . was a character of disrepute and of suspicion." C. WARREN, *A HISTORY OF THE AMERICAN BAR* 4 (1966).

339. 3 U.S. (3 Dall.) 306 (1796).

ney fees to prevailing litigants]."<sup>340</sup>

The American rule has persisted, but there is no generally accepted justification for it.<sup>341</sup> A number of explanations have been advanced over the years. Justice Goldberg once described the American rule as "a deliberate choice to insure that access to the Courts be not effectively denied to those of moderate means."<sup>342</sup> In other words, the American rule forecloses the possibility that an impoverished plaintiff will be deterred from suing by the prospect of having to pay both his own and his opponent's attorney fees in the event that he loses the case. But others have argued that the American rule actually hinders access to the courts because impoverished litigants will be precluded from bringing suit by the prospect of having to pay their own attorney fees whether they win or lose.<sup>343</sup>

In Maryland, as elsewhere, there are a number of exceptions to the American rule.<sup>344</sup> For example, attorney fees may be awarded if a relevant statute provides for such an award.<sup>345</sup> Also, attorney fees

340. *Id.* at 306. Some commentators assert that the American rule evolved gradually from the English rule as pre-colonial statutes, which allowed for recovery of attorney fees but with fixed maximum levels, failed to keep pace with inflation. See Note, *supra* note 331, at 1218-19; see also Leubsdorf, *supra* note 334, at 10-17 (discussing colonial legislation of fees, *Arcambel v. Wiseman*, and the American rule's emergence); C. McCormick, *supra* note 331, § 60 (discussing the history and scope of costs awarded at common law). This theory appears inconsistent with *Arcambel*, which indicated that the American rule was established before 1800. See 3 U.S. (3 Dall.) at 306.

341. See Leubsdorf, *supra* note 334, at 9 ("the justification of this rule and its significance in the economy of litigation have varied over the years"); Comment, *supra* note 337, at 681 (it has been argued both that the shifting of fees was the result of a "gradual forgetting," and conversely that it was a "deliberate choice").

342. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 237 (1964) (Goldberg, J., concurring); *accord Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) ("In support of the American rule, it has been argued that since litigation is at best uncertain, one should not be penalized for merely defending or prosecuting a lawsuit.").

343. See Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792, 793 (1966) ("[The] United States . . . which has taken it on itself to play the decisive role in building the Rule of Law through the world, has forgotten the little man in his struggle for civil justice."); see also Cosway, *Attorney's Fees as an Element of Damages*, 15 U. CIN. L. REV. 313, 314-15 (1941) (discussing reasons for adopting the English rule over the American rule); Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 849 (1975) ("Our legislatures have recently been quite ready to create private causes of action which are thought to serve some public interest . . . [I]n the context of such private actions . . . the usual American rule . . . is felt to be a severe and unwelcome restraint."). For a comprehensive discussion of policy arguments for and against the American rule, see Rowe, *supra* note 331.

344. *St. Luke*, 318 Md. at 345, 568 A.2d at 39.

345. See *Freedman v. Seidler*, 233 Md. 39, 47, 194 A.2d 778, 783 (1963). For a list of Maryland statutes that provide for awards of attorney fees, see *St. Luke*, 318 Md. at 346 n.6, 568 A.2d at 39 n.6.

may be awarded if parties to a contract have agreed to the payment of attorney fees.<sup>346</sup> Courts may award attorney fees if there are "special circumstances."<sup>347</sup> Special circumstances have been found in cases in which the defendant's prior wrongful conduct has forced a plaintiff into litigation with a third party,<sup>348</sup> in certain implied indemnity actions,<sup>349</sup> and in actions resulting in a declaratory judgment that a liability insurer must defend the insured.<sup>350</sup> In addition, under Maryland's Rules of Procedure, courts may impose reasonable attorney fees on either party when a proceeding is brought or defended in bad faith or without substantial justification.<sup>351</sup>

*b. Punitive Damages.*—Punitive damages are awarded "to punish the wrongdoer, to teach him not to repeat his wrongful conduct and to deter others from engaging in the same conduct."<sup>352</sup> Though the Court of Appeals has also stated that their amount "must relate to the degree of culpability exhibited by a particular defendant and that party's ability to pay,"<sup>353</sup> the jury usually is given unfettered discretion in determining the size of punitive damage awards.<sup>354</sup> The lack of control over juries making these awards has come to be regarded as a serious problem.<sup>355</sup>

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346. See *Empire Realty Co. v. Fleisher*, 269 Md. 278, 286, 305 A.2d 144, 148 (1973) (attorney's fees are not recoverable in an action for damages absent special circumstances such as parties to a contract agreeing to the payment of fees).

347. See, e.g., *Freedman*, 233 Md. at 47, 194 A.2d at 783 ("the general rule is that costs and expenses other than the usual and ordinary court costs are not recoverable in an action for damages, and, in the absence of special circumstances or statutory requirement, counsel fees are not a proper element of damages in an action for breach of contract").

348. See, e.g., *McGaw v. Acker, Merrall & Condit Co.*, 111 Md. 153, 160, 73 A. 731, 734 (1909) (plaintiff allowed to recover fees and costs that were incurred in securing the new lease in its own name after defendant wrongfully secured in his own name a lease on the property).

349. See, e.g., *Jones v. Calvin B. Taylor Baking Co.*, 253 Md. 430, 441, 253 A.2d 742, 748 (1969) ("unless the indemnity contract provides otherwise, an indemnitee is entitled to recover, as part of the damages, reasonable attorney's fees" (citing 41 AM. JUR. 2d, *Indemnity* § 36 (1968))).

350. See, e.g., *Bankers & Shippers Ins. Co. v. Electro Enters.*, 287 Md. 641, 661, 415 A.2d 278, 289 (1980) ("the attorneys' fees and expenses, incurred in defending the underlying judgment action, constitute those resulting damages and are recoverable").

351. See Md. R. 1-341; see also *Tully v. Dasher*, 250 Md. 424, 442, 244 A.2d 207, 217 (1968) (attorney fees may be awarded when a plaintiff has been forced to defend against a malicious prosecution).

352. *Wedeman v. City Chevrolet Co.*, 278 Md. 524, 531, 366 A.2d 7, 12 (1976).

353. *Embrey v. Holly*, 293 Md. 128, 141-42, 442 A.2d 966, 973 (1982).

354. See *St. Luke*, 318 Md. at 350, 568 A.2d at 41.

355. See *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (Brennan, J., concurring) ("Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is ap-

Of the states that have considered the issue presented in *St. Luke*, eleven have allowed juries to consider attorney fees when awarding punitive damages,<sup>356</sup> and six have refused.<sup>357</sup> Of the remaining states that permit punitive damages,<sup>358</sup> the American rule presumably applies, preventing juries from considering attorney fees as part of the award.<sup>359</sup> The *Second Restatement of Torts* supports allowing juries to consider the plaintiff's expenses when punitive damages are allowed.<sup>360</sup>

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propriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision."); see also AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 3-4 (1989) ("[s]erious consideration should be given to raising the standard of proof, to developing better jury instructions and to greater judicial supervision concerning punitive damage awards"); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 SO. CAL. L. REV. 1, 37-39 (1982) (the variety and vagueness of the terms used to characterize the criteria for punitive damages would create enough confusion when used by judges alone, but juries are the ones most often assessing punitive damages and jury instructions as to how to assess damages are often unclear); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 13, 139 (1986) ("[P]unitive damages are out of control. Certainly recent awards have been unprecedented both in incidence and amount.").

356. See *Markey v. Santangelo*, 195 Conn. 76, 485 A.2d 1305 (1985); *Umphrey v. Sprinkel*, 106 Idaho 700, 682 P.2d 1247 (1983); *Suss v. Schammel*, 375 N.W.2d 252 (Iowa 1985); *Newton v. Hornblower*, 224 Kan. 506, 582 P.2d 1136 (1978); *Central Bank of Mississippi v. Butler*, 517 So. 2d 507 (Miss. 1987); *Senn v. Manchester Bank of St. Louis*, 583 S.W.2d 119 (Mo. 1979); *Villella v. Waikem Motors, Inc.*, 45 Ohio St. 3d 36, 543 N.E.2d 464 (1989); *Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984); *Debry & Hilton Travel Servs., Inc. v. Capitol Int'l Airways, Inc.*, 583 P.2d 1181 (Utah 1978); *Kemp v. Miller*, 166 Va. 661, 186 S.E. 99 (1936); *Olds v. Hosford*, 354 P.2d 947 (Wyo. 1960), *reh'g denied*, 359 P.2d 406 (1961). In *St. Luke*, the dissent argued that Connecticut should be considered separately, because that state permits punitive damages only to the extent of attorney fees. See 318 Md. at 362 n.5, 568 A.2d at 47 n.5 (Rodowsky, J., dissenting).

357. See *Viner v. Untrecht*, 26 Cal. 2d 261, 158 P.2d 3 (1945); *Reintsma v. Lawson*, 223 Mont. 520, 727 P.2d 1323 (1986); *Kinane v. Fay*, 111 N.J.L. 553, 168 A. 724 (1933); *International Elec. Co. v. N.S.T. Metal Prods. Co.*, 370 Pa. 213, 88 A.2d 40 (1952); *Earl v. Tupper*, 45 Vt. 275 (1873); *Fairbanks v. Witter*, 18 Wis. 287 (1864). These decisions reason that punitive damages should not encompass compensatory considerations, and that juries should have complete discretion in setting punitive awards. See *St. Luke*, 318 Md. at 350, 568 A.2d at 41.

358. Louisiana and Nebraska do not permit punitive awards. See *McCoy v. Arkansas Natural Gas Co.*, 175 La. 487, 143 So. 383 (1932), *cert. denied*, 287 U.S. 661 (1932); *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960). Massachusetts and Washington permit punitive damages only when specifically authorized by statute. See *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 47 N.E.2d 265 (1943); *Spokane Truck & Dray Co. v. Hofer*, 2 Wash. 45, 25 P. 1072 (1891). By statute, New Hampshire also has abolished punitive damages except where specifically authorized by another statute. See N.H. REV. STAT. ANN. § 507:16 (1986). See generally J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW & PRACTICE § 4 (1990) (summary of states' positions on punitive damages).

359. See 318 Md. at 362, 568 A.2d at 47 (Rodowsky, J., dissenting).

360. See RESTATEMENT (SECOND) OF TORTS § 914 (1979).

3. *Analysis.*—The majority offers three reasons for permitting juries to consider attorney fees when determining the amount of punitive damages. First, punitive damages and awards of attorney fees share a common goal of punishment.<sup>361</sup> Second, allowing juries to consider attorney fees will provide them guidance in setting punitive awards.<sup>362</sup> Third, plaintiffs can be made whole in cases in which the defendant's conduct is most egregious.<sup>363</sup>

The court's first rationale, that an award of attorney fees is punitive because most Maryland statutory provisions providing for attorney fee recovery are found in the statutes' penalty sections, is weak in two respects. First, as the dissent argued, many of the Maryland statutory provisions for attorney fees awards are contained in consumer protection statutes.<sup>364</sup> These statutes allow a prevailing plaintiff to obtain attorney fees in order to equalize the parties' positions, rather than to punish the defendant.<sup>365</sup>

The rationale's other weakness is that the amount of a plaintiff's attorney fees bears no clear relation to either the particular defendant's culpability, or the defendant's ability to pay.<sup>366</sup> These are the factors that ought to guide juries in awarding punitive damages.<sup>367</sup> Though awards of attorney fees are in a sense punitive, they do not correspond with the traditional purposes of punitive damages.

The court's second rationale, that juries will be guided in setting punitive damage awards by considering the attorney fees, addresses the substantial concern about the vague instructions given to juries charged with calculating punitive awards.<sup>368</sup> One proposed solution to this problem is to require that punitive damages bear a proportional relationship to compensatory damages; for example, that punitive damages be set at two times compensatory damages, similar to the way that statutory treble damages are imposed.<sup>369</sup> But

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361. See *St. Luke*, 318 Md. at 347, 568 A.2d at 40. The court noted that statutory provisions authorizing recovery of attorney fees are usually contained in the statute's penalty or liability section. See *id.* at 346-47, 568 A.2d at 39.

362. See *id.* at 352-53, 568 A.2d at 42-43.

363. See *id.* at 354, 568 A.2d at 43.

364. See *id.* at 360, 568 A.2d at 46 (Rodowsky, J., dissenting).

365. See *id.*

366. See 318 Md. at 357-58, 568 A.2d at 45 (Rodowsky, J., dissenting). The dissent noted that each plaintiff in a case may have a different contingent fee arrangement with her counsel. See *id.*

367. See *Embrey v. Holly*, 293 Md. 128, 141-42, 442 A.2d 966, 973 (1982).

368. See *supra* note 355 and accompanying text.

369. The American College of Trial Lawyers recommends that the amount of punitive damages be limited by a flexible formula based on the amount of compensatory dam-

there are two potential problems with a proportional relationship scheme: it does not attempt to measure the wrongfulness of the particular defendant's conduct, and it strips juries of all autonomy in setting punitive awards. A policy allowing juries merely to consider attorney fees as an aid in calculating punitive damages enjoys an advantage over the proportional relationship approach in that juries are provided with some guidance, but they maintain their ability to take into account other circumstances in determining the most appropriate punitive award.

The dissent predicted that implementating the majority's holding will establish the amount of attorney fees as a floor for punitive damages.<sup>370</sup> Rather than producing more accurate punitive damage awards, allowing juries to consider the amount of the victim's attorney fees will tend to increase punitive awards and to discourage settlement of disputes, as plaintiffs are encouraged to seek a "bonanza" from the jury.<sup>371</sup> This criticism ignores the widely-held view that juries already covertly take attorney fees into account when awarding punitive damages.<sup>372</sup> In addition, the jury can be instructed that the amount of attorney fees is only one factor to be considered, and is not necessarily a floor, a ceiling, or a benchmark for a punitive award.

The majority's third rationale, that the plaintiff will be made whole in cases involving exceptionally wrongful conduct, appeals to a sense of fairness.<sup>373</sup> This rationale, however, runs counter to the American rule, which inherently rejects making plaintiffs truly

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ages. See AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 355, at 13-15. Missouri assesses punitive damages that are a multiple of one and one-half times actual damages. See *Senn v. Manchester Bank of St. Louis*, 583 S.W.2d 119, 139 (Mo. 1979). Maryland has rejected suggestions that there should be a ratio between the amounts of compensatory damages and punitive damages. See *D.C. Transit Sys. v. Brooks*, 264 Md. 578, 589-90, 287 A.2d 251, 257 (1972).

370. See 318 Md. at 356, 568 A.2d at 44 (Rodowsky, J., dissenting).

371. See *id.*, 568 A.2d at 44-45 (Rodowsky, J., dissenting).

372. See, e.g., Ehrenzweig, *supra* note 343, at 797 ("juries in making their assessments now probably quite generally take into account the plaintiff's counsel fees and would be likely to reduce their verdicts correspondingly if instructed as to plaintiff's right to recover his fees in addition to the sum assessed"); Leubsdorf, *supra* note 334, at 14 ("it is quite likely that juries took legal expenses into consideration when they assessed damages as indeed is probably the case today").

373. See *First Report of the Judicial Council of Massachusetts*, 11 MASS. L.Q. 64 (1925).

On what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill? And on what principle of justice is a defendant who has been wrongfully haled into court made to pay out of his own pocket the expense of showing that he was wrongfully sued?

*Id.*

whole.<sup>374</sup> The majority viewed the American rule as allowing for an exception when the primary rationale is punishment.<sup>375</sup> The dissent, citing the American rule's long history in Maryland,<sup>376</sup> argued that exceptions to the rule should only come through legislative or rulemaking action.<sup>377</sup> The majority seems to have the better of this argument. Of the various justifications advanced by commentators for the American rule,<sup>378</sup> none apply with any great force to a situation in which punitive damages are to be awarded. By merely relying upon tradition, without a policy justification for the rule's application, the dissent failed to effectively counter the majority opinion.<sup>379</sup>

The dissent's argument that the General Assembly should make any changes to the American rule<sup>380</sup> is also unconvincing. Both the rule and the concept of punitive damages are creations of common law, so judicially-created changes are appropriate. And the dissent's statement that "[h]istorically, in Maryland, creation of exceptions to the American rule has been allocated to legislative or rulemaking action"<sup>381</sup> is belied by the fact that the court has created numerous exceptions under the rubric of "special circumstances."<sup>382</sup>

4. *Conclusion.*—*St. Luke* breaks with the tradition of the American rule by sanctioning "making-whole" the prevailing litigants in actions in which punitive damages are awarded. The case also

374. See Rowe, *supra* note 331, at 660.

375. See 318 Md. at 349, 568 A.2d at 41.

376. See *id.* at 358-59, 568 A.2d at 45-46 (Rodowsky, J., dissenting).

377. See *id.* at 360-61, 568 A.2d at 46-47 (Rodowsky, J., dissenting).

378. See Goodhart, *supra* note 332, at 876-77 ("[a]nother objection to the introduction of substantial costs is based on the view that the law at best is a gamble, and that it is unfair to penalize the losing party"); Rowe, *supra* note 331 at 659-61 (The idea behind fee shifting and making-whole is to compensate for a legal wrong, whether for the plaintiff or the defendant. Shifting fees to the defendant doesn't seem to be justified, however, because the system does not regard bringing a losing case as an infliction of a legal wrong.); Note, *supra* note 331, at 1220, 1231 (discussing the early American attitude that litigation was a "sport" and several criticisms of fee shifting); Note, *supra* note 330, at 591 ("A related justification for the American Rule is that a party should not be punished by being assessed the opponent's counsel fees for merely bringing or defending a lawsuit."); Comment, *supra* note 337, at 681 ("[M]any attorneys today support the American Rule as 'part of our democratic tradition and a bulwark of equality.'").

379. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.")

380. See 318 Md. at 360, 568 A.2d at 47 (Rodowsky, J., dissenting).

381. *Id.* at 359, 568 A.2d at 46-47 (Rodowsky, J., dissenting).

382. See *supra* notes 347-350 and accompanying text.

shows that the Court of Appeals is cognizant of the problem of uncontrolled awards of punitive damages.<sup>383</sup> Though allowing the jury to consider attorney fees is hardly a complete cure, it represents an affirmative effort to address the problem.

### F. Parent-Child Immunity

In *Smith v. Gross*,<sup>384</sup> a divided Court of Appeals<sup>385</sup> held that the parent-child immunity defense bars survival and wrongful death actions against a parent when a child is killed as a result of the parent's negligence.<sup>386</sup> The court reasoned that Maryland's wrongful death<sup>387</sup> and survival statutes<sup>388</sup> allow only those actions that could have been pursued by the decedent if he or she had survived.<sup>389</sup> Thus, the parent-child immunity rule, which would have prevented the child from bringing a personal injury suit against his parent, also precludes any action after the child's death.<sup>390</sup> In considering whether parent-child immunity should apply despite the child's death, the court examined the rule's public policy justifications and its history in Maryland.<sup>391</sup> The majority opinion purported to promote familial tranquility and harmony, but ignored the dissent's strong argument that public policy no longer justifies parent-child immunity when the child has died.<sup>392</sup> The court's decision is also unfortunate in that it left the rule's modification to the legislature, although it was judicially created.<sup>393</sup>

1. *The Case.*—Virginia Lee Smith and Roland Randolph Gross were the natural parents of Roland Randolph Gross, Jr.<sup>394</sup> The child was born out of wedlock and his parents never married.<sup>395</sup> Ro-

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383. The dissent did not disagree with the majority on this point. See 318 Md. at 363, 568 A.2d at 48 (Rodowsky, J., dissenting) ("the law of punitive damages is 'broke' and needs 'fixing'").

384. 319 Md. 138, 571 A.2d 1219 (1990).

385. Judge Orth wrote the court's opinion, and was joined by Chief Judge Murphy and Judges Cole, Rodowsky, and McAuliffe. Judge Eldridge wrote in dissent, joined by Judge Adkins.

386. See 319 Md. at 149, 571 A.2d at 1224.

387. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-901 to -904 (1989).

388. *Id.* § 6-401.

389. See 319 Md. at 149, 571 A.2d at 1224.

390. *Id.* at 149-50, 571 A.2d at 1224.

391. See *id.* at 145-48, 571 A.2d at 1222-24.

392. See *id.* at 150-56, 571 A.2d at 1224-27 (Eldridge, J., dissenting).

393. See *infra* notes 456-461 and accompanying text.

394. 319 Md. at 140, 571 A.2d. at 1220.

395. *Id.* at 147, 571 A.2d at 1223.



land Jr. was killed several days after his second birthday<sup>396</sup> in an automobile accident allegedly caused by his father's negligence.<sup>397</sup> Smith instituted survival and wrongful death actions against Gross in the Circuit Court for Dorchester County.<sup>398</sup> Gross moved for dismissal for failure to state a claim, asserting that he was immune from suit because he was the child's natural father. The court granted the father's motion and dismissed the claim. Smith appealed, and the Court of Appeals certified the case of its own motion prior to a decision by the Court of Special Appeals, and affirmed the circuit court's judgment.<sup>399</sup>

## 2. *Legal Background and the Court's Reasoning.*—

a. *The Inception of Parent-Child Immunity.*—Parent-child immunity is a common-law rule that prevents plaintiffs from pursuing intrafamily tort actions.<sup>400</sup> The rule first was recognized in the 1891 Mississippi case of *Hewlett v. George*.<sup>401</sup> In *Hewlett*, the court refused to allow a daughter to sue her mother for compensation after the mother placed the daughter in an insane asylum in order to acquire her property.<sup>402</sup> The court justified its holding by explaining the underlying public policy: "[t]he peace of society . . . forbid[s] [to] the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hand of a parent."<sup>403</sup>

Despite the decision's novelty,<sup>404</sup> other states embraced the rule, citing overriding public policy considerations.<sup>405</sup> Courts generally justify the rule in three ways: "(1) protection of the family's

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396. *Id.* at 141, 571 A.2d at 1220.

397. *Id.* Smith alleged in her complaint that Roland Sr. "operat[ed] his automobile while under the influence of alcohol . . . [and] in a careless and reckless manner." *Id.* at 150, 571 A.2d at 1224.

398. *Id.* at 141, 571 A.2d at 1220.

399. *See id.* at 150, 571 A.2d at 1224.

400. W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 12.2, at 905 (5th ed. 1984).

401. 68 Miss. 703, 9 So. 885 (1891).

402. *See id.* at 711, 9 So. at 887.

403. *Id.*

404. *See* Comment, *Parent-Child Tort Immunity: Time for Maryland to Abrogate an Anachronism*, 11 U. BALT. L. REV. 435, 439 (1982). For a discussion of the history of parent-child legal relations, *see* Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489 (1982).

405. *See* McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (barring a child's action against the father and stepmother for cruel and inhuman treatment); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (barring a daughter's action against her father for rape).

resources from the disproportionate enrichment of the plaintiff family member; (2) protection of family integrity and harmony; and (3) protection of parental discretion in the discipline and care of the child."<sup>406</sup> The rule's critics have charged that these policy concerns are either too nebulous or outdated.<sup>407</sup> They have argued for the rule's complete abrogation,<sup>408</sup> significant amendment,<sup>409</sup> or the creation of a new rule based on a "reasonable parent" standard.<sup>410</sup>

Over the past century, many courts have either entirely abrogated the rule or carved out exceptions when the public policy justifications are no longer served.<sup>411</sup> *Smith v. Gross* gave the court an opportunity to apply such an exception, but the court refused to amend or abolish the antiquated rule.

*b. Survival and Wrongful Death Statutes.*—The court primarily based its refusal to amend parent-child immunity on the language of the survival and wrongful death statutes. The survival statute provides that except as to an action for slander, "a cause of action at law, whether real, personal, or mixed, survives the death of either party."<sup>412</sup> As a personal representative of the decedent's estate, Smith is authorized to prosecute "*a personal action which the decedent might have commenced or prosecuted . . .*"<sup>413</sup>

The wrongful death statute provides that "[a]n action may be maintained against a person whose wrongful act causes the death of another."<sup>414</sup> Wrongful act is defined as "an act, neglect or default including a felonious act *which would have entitled the party injured to*

406. Comment, *supra* note 404, at 440.

407. See Hollister, *supra* note 404, at 496-508.

408. See Comment, *supra* note 404; Comment, *Parent-Child Immunity: The Case for Abolition*, 6 SAN DIEGO L. REV. 286 (1969).

409. See McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930); Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 MO. L. REV. 152 (1961).

410. See Hollister, *supra* note 404, at 525-27.

411. The rule's four most common exceptions are found in cases involving emancipated children, intentional torts or gross negligence, the business or employment context, and motor vehicle torts. See, e.g., *Martinez v. Southern Pac. Co.*, 45 Cal. 2d 244, 253-54, 288 P.2d 868, 873 (1955) (exception for emancipated children); *Trevarton v. Trevarton*, 151 Colo. 418, 423, 378 P.2d 640, 643 (1963) (business or employment exception); *Ooms v. Ooms*, 164 Conn. 48, 51, 316 A.2d 783, 785 (1972) (statutory motor vehicle exception); *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951) (exception for intentional tort).

412. MD. CTS. & JUD. PROC. CODE ANN. § 6-401(a) (1989).

413. *Smith*, 319 Md. at 142, 571 A.2d at 1221 (quoting MD. EST. & TRUSTS CODE ANN. § 7-401(x) (1974)) (emphasis by court).

414. MD. CTS. & JUD. PROC. CODE ANN. § 3-902(a) (1989).

*maintain an action and recover damages if death had not ensued.*"<sup>415</sup> As a primary beneficiary, Roland Jr.'s mother is authorized to sue and recover for his wrongful death.<sup>416</sup>

The court noted that these statutes authorize actions after the child's death only if the child might have maintained the action while he was alive.<sup>417</sup> Assuming that parent-child immunity would have precluded this suit if Roland Jr. were still alive,<sup>418</sup> the statutes' language could prevent his mother from pursuing this action after his death.

The court also stated that as a general rule in wrongful death or survival actions, a defense that would have been good against the decedent had he or she survived, will be good against the decedent's personal representative.<sup>419</sup> Thus the issue was narrowed to whether parent-child immunity would be an exception to this rule; if not, the immunity would survive Roland Jr.'s death and bar his mother's action.

*c. The Development of Parent-Child Immunity.*—To determine whether parent-child immunity should bar the mother's action, the court examined the rule's history in Maryland and its public policy justification. The court noted that in 1930 Maryland courts adopted parent-child immunity in *Schneider v. Schneider*.<sup>420</sup> The court in *Schneider* refused to allow a mother to sue her son for injuries proximately caused by his negligent driving.<sup>421</sup> Citing *Hewlett* and its line of case law, the *Schneider* court approved the rule's public policy basis: "We need not dwell upon the importance of maintaining the family relation free for other reasons from the antagonisms which such suits imply. 'Both natural and politic law, morality, and the precepts of revealed religion alike demand the preservation of this relation in its full strength and purity.'"<sup>422</sup>

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415. *Smith*, 319 Md. at 143, 571 A.2d at 1221 (quoting MD. CTS. & JUD. PROC. CODE ANN. § 3-901(e) (1989)) (emphasis by court).

416. *See* MD. CTS. & JUD. PROC. CODE ANN. § 3-904(a) (1989).

417. *See Smith*, 319 Md. at 143, 571 A.2d at 1221.

418. Even the dissent conceded that parent-child immunity would preclude any personal injury action by Roland Jr. against his father if Roland Jr. had survived. *See id.* at 150, 571 A.2d at 1224 (Eldridge, J., dissenting).

419. *See id.* at 144, 571 A.2d at 1221. The court used contributory negligence and assumption of risk as examples of defenses good against a decedent's personal representative. *See id.* at 144-45, 571 A.2d at 1221-22.

420. 160 Md. 18, 152 A. 498 (1930).

421. *See id.* at 20, 152 A. at 499.

422. *Id.* at 23-24, 152 A. at 500 (quoting J. SCHOULER, DOMESTIC RELATIONS § 223, at 345 (5th ed. 1895)).

Over the next sixty years, Maryland recognized only two exceptions to the parent-child immunity doctrine. First, in *Waltzinger v. Brisner*,<sup>423</sup> the court held that children who were emancipated at the time of the tortious conduct could pursue an action against their parents and vice versa.<sup>424</sup> Second, in *Mahnke v. Moore*,<sup>425</sup> the court held that children who are the victims of cruel and inhuman, or wanton and malicious conduct, will not be prevented from recovering from their parents for their injuries.<sup>426</sup>

Since establishing these two early exceptions to the defense,<sup>427</sup> the Maryland courts have refused five times to amend the rule, or reconsider its underlying public policy principles. Each time, the court has looked to the legislature as the appropriate body for change. First, in a 1971 case, *Latz v. Latz*,<sup>428</sup> the Court of Special Appeals refused to create an exception for torts involving automobiles when the driver was covered by insurance.<sup>429</sup> In justifying its action in *Latz*, the court said "[i]f there is a need for change let it come by legislative enactment."<sup>430</sup> Next, in *Montz v. Mendoloff*,<sup>431</sup> the court declined to make an exception to the rule for torts involving alleged gross negligence.<sup>432</sup> Again, the court pointed to the legislature's inaction and claimed that, "[the rule] is now more firmly embedded in the law of Maryland and we decline

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423. 212 Md. 107, 128 A.2d 617 (1956).

424. See *id.* at 126, 128 A.2d at 627. The plaintiff in *Waltzinger* sued her adult son for injuries caused by his negligent operation of an automobile. See *id.* at 110-11, 128 A.2d at 618.

425. 197 Md. 61, 77 A.2d 923 (1951).

426. See *id.* at 70, 77 A.2d at 927. In *Mahnke*, the plaintiff daughter was allowed to recover from her father's estate for shock, mental anguish, and permanent nervous and physical injuries after the father shot the mother in the child's presence, left the child with the mother's body for six days, and finally committed suicide in front of her. See *id.* at 63, 77 A.2d at 924.

427. The *Mahnke* decision is considered a "hallmark" case, and the Maryland court's novel approach has had a "pervasive" effect on other states' application of immunity. Comment, *supra* note 404, at 451.

428. 10 Md. App. 720, 272 A.2d 435, *cert. denied*, 261 Md. 726, 276 A.2d 642 (1971).

429. *Latz* cited *Schneider v. Schneider*, 160 Md. 18, 152 A. 498 (1930), for the proposition that the presence of liability insurance does not affect the suit. See 10 Md. App. at 729-30, 272 A.2d at 440. For a critique of this position, see Hollister, *supra* note 404, at 500-04; see generally Fleming, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

430. 10 Md. App. at 734, 272 A.2d at 443.

431. 40 Md. App. 220, 388 A.2d 568, *cert. denied*, 283 Md. 736 (1978).

432. The gross negligence alleged in *Montz* was reckless operation of an automobile. The court believed that the tortious behavior did not fall within the *Mahnke* standard for wanton and willful misconduct, nor did it find any indication of an abandonment of parental authority. See *id.* at 225, 388 A.2d at 571.

to change it.”<sup>433</sup> In 1979, the Court of Special Appeals in *Shell Oil Co. v. Ryckman*<sup>434</sup> refused to create a business or contractual exception to the parent-child immunity rule.<sup>435</sup> This case involved an oil company’s claim for contribution from a lessor of one of its gas stations for damages paid to the lessor’s son for injuries incurred on the business premises.<sup>436</sup> The court held that parent-child immunity prevented the indemnification action after the company had settled with the child.<sup>437</sup> In *Frye v. Frye*<sup>438</sup> the Court of Appeals reexamined in detail the rationale for parent-child immunity, and refused to abrogate it despite the court’s recent abrogation of the interspousal immunity rule.<sup>439</sup> Although it acknowledged that many other states have abrogated the immunity, the court again passed on its responsibility, asking, “who can best resolve [the issues], the seven judges of this Court or the members of the General Assembly?”<sup>440</sup> Finally, the court reaffirmed the rule in *Smith v. Gross*, explaining that despite changing values, “both this Court and the legislature have been faithful to the promotion of the stability, harmony and peace of the family and to the preservation of parental authority and the family unity as a matter of public policy in the best interests of society.”<sup>441</sup>

*d. The Court’s Reasoning.*—In this case, Smith argued that no public policy barred liability because no parent-child relationship existed for the court to protect since Roland Jr. was born out of wedlock<sup>442</sup> and is no longer alive.<sup>443</sup> The court rejected her argument that Roland Jr.’s illegitimacy denied Roland Sr. the right to the

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433. *Id.* at 224, 388 A.2d at 570.

434. 43 Md. App. 1, 403 A.2d 379 (1979).

435. *See id.* at 4, 403 A.2d at 381. *But see* Hatzinicholas v. Protopapas, 314 Md. 340, 550 A.2d 947 (1988) (creating a narrow exception for a child to maintain action against her father’s business partnership for injuries sustained at place of business). For a detailed discussion, see Survey, *Developments in Maryland Law*, 49 MD. L. REV. 509, 761 (1989).

436. *See* 43 Md. App. at 2, 403 A.2d at 380.

437. *See id.* at 5, 403 A.2d at 381.

438. 305 Md. 542, 505 A.2d 826 (1986).

439. The court abrogated the interspousal immunity rule as to cases sounding in negligence in *Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506 (1983). The court rejected comparison between the interspousal and the parent-child immunities as “not pertinent or relevant.” 305 Md. at 553, 505 A.2d at 832.

440. 305 Md. at 566, 505 A.2d at 838.

441. 319 Md. at 147, 571 A.2d at 1223 (quoting *Frye v. Frye*, 305 Md. 542, 561, 505 A.2d 826, 836 (1986)).

442. *See id.*

443. *See id.* at 149, 571 A.2d at 1224.

parental immunity defense.<sup>444</sup> The court explained that "[t]he maintenance of a common home is not the *sine qua non* of the elements of parenthood. The primary requisite of a father-child relationship is not that a person reside with the child but that the person is, in fact, the father of the child."<sup>445</sup> The court also rejected the mother's claim that the child's death argued against parental immunity. The court simply stated that the "personal tort action by the child while alive was killed by the rule. The death of the child did not serve to remove the immunity dictated by the rule and resurrect the action."<sup>446</sup>

The court thus concluded that the statutes' language is clear and the public policy justifications are still compelling. The court pointed out that although the legislature has been aware of the parent-child immunity rule for more than fifty years, it has never modified the wrongful death and survival statutes to allow for the type of action brought in this case.<sup>447</sup> Because the statutes stand "legislatively unsullied," they prevent Roland Jr.'s mother from proceeding against the father both in her own right as a parent, and as the personal representative of the child's estate.<sup>448</sup>

3. *Analysis.*—The court grounded its refusal to modify the parent-child immunity rule on a literal reading of the survival and wrongful death statutes, and the continued soundness of the public policy justification. The court dismissed the plaintiff's argument that the public policy behind the immunity rule no longer is served in this case.<sup>449</sup> But as the dissenting opinion recognized, Roland Jr.'s death drastically altered the situation.<sup>450</sup> When the boy died, there was no "family discipline to impair or home tranquility to preserve."<sup>451</sup>

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444. See *id.* at 147-48, 571 A.2d at 1223. *Mahnke* also discussed the illegitimacy issue. See 197 Md. 61, 64, 77 A.2d 923, 924 (1951).

445. *Smith*, 319 Md. at 147-48, 571 A.2d at 1223. The court was careful to distinguish this case from the *Mahnke* situation, in which the parent has forfeited parental obligations or forsworn parental authority, rights, and privileges. See *id.* Although the details of the father's participation in Roland Jr.'s life are unknown, the court noted that, "[c]learly, he had not completely abandoned the parental relationship; the child was with him at the time of the accident." *Id.* at 148, 571 A.2d at 1223.

446. *Id.* at 149-50, 571 A.2d at 1224.

447. See *id.* at 149, 571 A.2d at 1224.

448. *Id.*

449. See *id.*

450. See *id.* at 150, 571 A.2d at 1224 (Eldridge, J., dissenting).

451. *Id.* In this case, Roland Jr.'s death effectively ended the family relationship. It is unclear how the dissenting judges would view a situation in which other surviving children continued to live with one of the parents.

When the parent-child relationship no longer exists, or is severed beyond repair, public policy should not prevent a child from recovering from the parent. This argument is not new to the Maryland court, for it was the basis for the *Waltzinger* and *Mahnke* exceptions. In *Waltzinger*, which involved a suit between an adult child and a parent,<sup>452</sup> the court cited with approval the language of a Mississippi decision involving similar facts: "[I]n this case both parties are adults and each may be sued by the other, there being no question of control or services between them . . . ."<sup>453</sup> Similarly, the exception to the parent-child immunity for cruel and malicious acts adopted in *Mahnke* was based upon the parent-child relationship's deterioration.<sup>454</sup> Given the father's atrocious acts, the daughter's suit against her father's estate was not contrary to public policy, for the simple reason that "there [was] no home at all in which discipline and tranquility [were] to be preserved."<sup>455</sup> The death of one of the parties is a situation in which no family is left to protect, yet the majority refused to consider seriously another exception to the immunity rule.

As for the argument that the legislature is responsible for changing the rule, the dissent pointed out that parent-child immunity is a judicially-created rule adopted by the court in 1930.<sup>456</sup> The survival and wrongful death statutes, however, remain substantially unchanged since their passage in 1798 and 1852, respectively.<sup>457</sup> These statutes were drafted many years prior to the immunity rule's adoption. Thus, the statutory language allowing only those actions that a decedent could have pursued had he or she survived, could not have been intended to cover parent-child immunity. Instead, this language was intended to apply to defenses such as contributory negligence and assumption of risk, which bar every tort action regardless of the parties' identities.<sup>458</sup> In contrast, parent-child immunity only bars an action by certain parties because of overriding public policy considerations.<sup>459</sup> It is doubtful that the legislature intended the statutes to incorporate all immunities or public policy defenses unless the public policy would be served by incorpora-

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452. See *supra* note 424.

453. *Weyen v. Weyen*, 165 Miss. 257, 267, 139 So. 608, 610 (1932).

454. See 197 Md. 61, 68, 77 A.2d 923, 926 (1951).

455. *Id.*

456. See *Smith*, 319 Md. at 153, 571 A.2d at 1226 (Eldridge, J., dissenting); see *supra* notes 420-422 and accompanying text.

457. *Smith*, 319 Md. at 152, 571 A.2d at 1225 (Eldridge, J., dissenting).

458. See *id.*, 571 A.2d at 1225-26 (Eldridge, J., dissenting).

459. See *id.*, 571 A.2d at 1226 (Eldridge, J., dissenting).

tion.<sup>460</sup> The court willingly amended the rule in other situations in which public policy was no longer served;<sup>461</sup> there was no reason for its refusal to do so in this case.

Maryland has fallen behind the modern trend toward amending or eliminating the parent-child immunity rule. Recently, in *Frye v. Frye*,<sup>462</sup> the court assessed other states' positions on the rule and attached a summary of its findings.<sup>463</sup> Only nine states retain the immunity intact, fourteen states have either completely abrogated the rule or never adopted it, and twenty-six states have abrogated it in part.<sup>464</sup> Eleven state courts have allowed parent-child actions after one of the parties has died; only five courts have taken Maryland's position and blocked such actions.<sup>465</sup> In spite of this, given the court's persistent refusal to amend the rule, it is unlikely that it will recognize any further exceptions to the parent-child immunity rule.

4. *Conclusion.*—*Smith v. Gross* presented an opportunity for the court to create a logical exception to parent-child immunity without significantly departing from its previous reasoning. Instead, the majority chose to rest its holding on statutory language that predated

460. *Id.* at 152-53, 571 A.2d at 1226 (Eldridge, J., dissenting).

461. See *supra* notes 423-426 and accompanying text.

462. 305 Md. 542, 505 A.2d 826 (1986). For a detailed discussion, see Note, *Frye v. Frye: Maryland Sacrifices the Child for the Sake of the Family*, 46 MD. L. REV. 194 (1986).

463. See 305 Md. at 568-86, 505 A.2d at 840-49.

464. *Id.* States that have retained parent-child immunity are Alabama, Arkansas, Georgia, Indiana, Louisiana, Mississippi, Missouri, Nebraska, and Tennessee. States that have abrogated the immunity entirely are California, Minnesota, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, and South Carolina. Immunity was never adopted in Hawaii, Nevada, South Dakota, Utah, and Vermont. All other states have amended the rule or abrogated it in part. *Id.*

465. For cases disagreeing with the Maryland position, see *Johnson v. Myers*, 2 Ill. App. 3d 844, 846, 277 N.E.2d 778, 779 (1972); *Harlan Nat'l Bank v. Gross*, 346 S.W.2d 482, 483 (Ky. 1961); *Plumley v. Klein*, 31 Mich. App. 26, 30, 187 N.W.2d 250, 252-53 (1971), *aff'd*, 388 Mich. 1, 199 N.W.2d 169 (1972); *Brennecke v. Kilpatrick*, 336 S.W.2d 68, 73 (Mo. 1960); *Gaudreau v. Gaudreau*, 106 N.H. 551, 553, 215 A.2d 695, 697 (1965); *Palcsey v. Tepper*, 71 N.J. Super. 294, 299, 176 A.2d 818, 820 (1962); *Dorsey v. State Farm Mut. Auto. Ins. Co.*, 9 Ohio St. 3d 27, 30, 457 N.E.2d 1169, 1171 (1984); *Parks v. Parks*, 390 Pa. 287, 297, 135 A.2d 65, 71 (1957); *Sisler v. Seeberger*, 23 Wash. App. 612, 614, 596 P.2d 1362, 1364 (1979). See also RESTATEMENT (SECOND) OF TORTS § 895G, comment g (1977), 2 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 8.11, at 574 (2d ed. 1986). For cases agreeing with the Maryland position, see *McNeal v. Administrator of Estate of McNeal*, 254 So. 2d 521, 523-24 (Miss. 1971); *Skinner v. Whitley*, 281 N.C. 476, 484, 189 S.E.2d 230, 234 (1972); *Castellucci v. Castellucci*, 96 R.I. 34, 37, 188 A.2d 467, 469 (1963); *Campbell v. Gruttemeyer*, 222 Tenn. 133, 139-40, 432 S.W.2d 894, 897-900 (1968); *Lasecki v. Kabara*, 235 Wis. 645, 650, 294 N.W. 33, 35 (1940).



Maryland's adoption of parent-child immunity. Thus, even though the immunity rule is a judicial creation, the rule's future modification must await legislative action.

*G. Post-Bankruptcy Survivability of Personal Injury Claim Assignments*

In *Hernandez v. Suburban Hospital*,<sup>466</sup> the Court of Appeals held valid the assignment of tort claim proceeds to a hospital,<sup>467</sup> and found that a patient's subsequent discharge in bankruptcy did not preclude the assignment's enforcement.<sup>468</sup> In addressing the assignment issue, the court recognized that in Maryland a chose in action in tort is generally assignable if it would survive the assignor's death, and could be enforced by the assignor's personal representative.<sup>469</sup> The court based its decision on the Maryland statute providing for survivorship,<sup>470</sup> and on policy reasons that support upholding such assignments.<sup>471</sup> In addressing the discharge in bankruptcy issue, the court followed the modern and widely accepted rule that unless disallowed or voided, an equitable lien survives bankruptcy, and held that discharge in bankruptcy did not preclude enforcement of the assignment.<sup>472</sup>

The court properly recognized the need to uphold the assignment to hospitals of tort claim proceeds. Nevertheless, the court did not indicate whether it based its holding on public policy or statutory grounds. Consequently, Maryland law remains unclear as to whether, in addition to tort proceeds, a tort cause of action is assignable. Furthermore, the court only addressed public policy considerations in regard to assignments to hospitals, implicitly leaving open the possibility that it would not enforce assignments to other parties.

1. *The Case*.—Giovanna Garcia twice was a patient at Suburban Hospital<sup>473</sup> to receive treatment for injuries she sustained in an automobile accident.<sup>474</sup> The total hospital fee for services was \$18,499. Garcia retained Arturo Hernandez to represent her in a

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466. 319 Md. 226, 572 A.2d 144 (1990).

467. See *id.* at 235, 572 A.2d at 148.

468. See *id.* at 237, 572 A.2d at 149.

469. See *id.* at 234, 572 A.2d at 148.

470. MD. CTS. & JUD. PROC. CODE ANN. § 6-401 (1989).

471. See 319 Md. at 235, 572 A.2d at 147.

472. See *id.* at 237, 572 A.2d at 149.

473. Garcia was hospitalized from September 7, 1985, to October 9, 1985, and from May 27, 1986, to May 30, 1986. *Id.* at 228, 572 A.2d at 145.

474. *Id.*

personal injuries claim arising from the accident.<sup>475</sup>

In October 1985, Garcia and Hernandez signed a document entitled "Authorization and Assignment," and delivered it to the hospital. Garcia signed the first part of the document, which stated in pertinent part: "I further irrevocably assign to you and authorize and direct said attorneys to pay from the proceeds of any recovery in my case all reasonable fees for services provided by you, including fees for preparation and testimony, as a result of the injuries or conditions heretofore mentioned."<sup>476</sup> Hernandez signed the second part, agreeing to comply with the authorization and to notify the hospital of the claim's status within ten days of request.<sup>477</sup>

On October 16, 1986, Garcia filed for bankruptcy under the Bankruptcy Act's Chapter 7.<sup>478</sup> She listed the hospital as an unsecured creditor on her schedule of debts.<sup>479</sup> The hospital received notice of Garcia's bankruptcy filing, which contained the statement: "Creditors: Do *NOT* file claims at this time. Debtor schedules indicate no assets exist from which to receive a dividend."<sup>480</sup>

Garcia was discharged in bankruptcy on March 7, 1987. On June 5, 1987, she settled her personal injury claim for the sum of \$35,000, and Hernandez received the settlement check from Garcia's insurer.<sup>481</sup> Hernandez deducted his fees and disbursed the remainder to Garcia, without notifying the hospital of the settlement or payment.<sup>482</sup>

On June 11, 1987, Hernandez notified the hospital that Garcia's debt had been discharged in bankruptcy and advised it that further attempts to collect the debt were prohibited. The hospital then demanded from Hernandez \$18,499 pursuant to the Authorization and Assignment.<sup>483</sup>

Hernandez declined to pay the bill, and the hospital subsequently filed its complaint against him in the Circuit Court for Montgomery County.<sup>484</sup> The court entered judgment for the hospital in the amount of its bill plus interest. The court concluded that

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475. *Id.* at 229, 572 A.2d at 145.

476. *Id.*

477. *Id.*

478. *Id.* at 230, 572 A.2d at 145; see 11 U.S.C. §§ 701-766 (1988).

479. *Hernandez*, 319 Md. at 230, 572 A.2d at 145-46.

480. *Id.*

481. Brief for Appellee at 4, *Hernandez v. Suburban Hosp.*, 319 Md. 226, 572 A.2d 144 (1990) (No. 89-37).

482. *Hernandez*, 319 Md. at 230, 572 A.2d at 146.

483. *Id.*

484. *Id.* at 231, 572 A.2d at 146.

by signing the authorization and assignment, Hernandez agreed to a "separate and collateral undertaking" not part of the debtor's primary responsibility.<sup>485</sup> Hernandez appealed to the Court of Special Appeals, but the Court of Appeals intervened and granted certiorari<sup>486</sup> of its own motion. In an opinion written by Chief Judge Murphy, the court affirmed the circuit court's judgment, and held that the assignment of tort proceeds was valid and not contrary to public policy,<sup>487</sup> and that a discharge in bankruptcy did not render the assignment unenforceable.<sup>488</sup>

## 2. *Legal Background and the Court's Reasoning.*—

a. *Assignment of Tort Proceeds.*—According to the common law, a chose in action for torts involving personal injuries could not be assigned.<sup>489</sup> The rule's principal justification was that such actions did not survive the injured person's death, and therefore were not assignable.<sup>490</sup> Public policy reasons also supported the rule against assignability—primarily the avoidance of champerty<sup>491</sup> and maintenance.<sup>492</sup> It was feared that unscrupulous people would purchase claims and thereby deal in lawsuits for human pain and suffering.<sup>493</sup>

Although acknowledging that personal injury actions could not be assigned, several courts have distinguished between assignment of a cause of action, and assignment of the proceeds that may be recovered in the action. In the early case of *Hutchinson v. Brown*,<sup>494</sup>

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485. *Id.*

486. *Id.* at 232, 572 A.2d at 146.

487. *See id.* at 235, 572 A.2d at 148.

488. *See id.* at 237, 572 A.2d at 149.

489. *Id.* at 233, 572 A.2d at 147. *See* 6 AM. JUR. 2D *Assignments* § 37 (1963); Annotation, *Assignability of Proceeds of Claim for Personal Injury or Death*, 33 A.L.R. 4th 82, 85 (1984).

490. *See, e.g.,* *Karp v. Speizer*, 132 Ariz. 599, 600, 647 P.2d 1197, 1198 (Ct. App. 1982); *see also* *City of Richmond v. Hanes*, 203 Va. 102, 122 S.E.2d 895 (1961) (only claims for wrongs to real or personal property, or resulting from breach of contract were assignable).

491. *See Karp*, 132 Ariz. at 600, 647 P.2d at 1199. Champerty is defined as "a bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered." BLACK'S LAW DICTIONARY 119 (5th ed. 1983).

492. Maintenance is defined as "an improper and officious intermeddling by a non-party in a suit which in no way belongs to such person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it." BLACK'S LAW DICTIONARY 490 (5th ed. 1983). *See, e.g.,* *Southern Farm Bureau Cas. Ins. Co. v. Wright Oil Co.*, 248 Ark. 803, 804-05, 454 S.W.2d 69, 70 (1970).

493. *See Southern Farm Bureau*, 248 Ark. at 805, 454 S.W.2d at 70.

494. 8 App. D.C. 157 (1896).

the District of Columbia Court of Appeals held that regardless of the invalidity of an assignment of a personal injury cause of action, equity may recognize an assignment of proceeds as an assignment of a possibility or expectancy, capable of enforcement as an assignment of a subsequent judgment or a charge against its proceeds.<sup>495</sup> Likewise, in *Richard v. National Transportation Co.*,<sup>496</sup> the Municipal Court of New York found that an assignment to a hospital of potential proceeds resulting from a personal injury claim was a valid equitable assignment, notwithstanding the existence of a statute expressly barring assignment of the underlying personal injury cause of action.<sup>497</sup> The theory behind the distinction was that an assignment of the proceeds of any settlement or judgment was not an assignment of an existing cause of action, but an assignment of future property.<sup>498</sup> The court emphasized that the assignor retained complete control of any lawsuit, or consummation of any settlement.<sup>499</sup> The law merely gave the hospital the right to demand that the assignor take the proper steps to enforce the cause of action.<sup>500</sup> The court found, therefore, that the assignment did not violate the basis of the rule against assigning tort claims.<sup>501</sup> The United States district court in *In re Musser*<sup>502</sup> also found a legally significant distinction between assignment of a personal injury cause of action, and assignment of the proceeds thereof.<sup>503</sup> The court emphasized that the hospital sought recoveries limited to the actual value of services rendered, and its right existed only in the proceeds.<sup>504</sup> Moreover, the hospital had no right to bring an action against a third party if the debtor failed to do so independently.<sup>505</sup>

A number of courts, however, have been unwilling to recognize the distinction.<sup>506</sup> For example, the Supreme Court of Arkansas in

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495. *See id.* at 163.

496. 158 Misc. 324, 285 N.Y.S. 870 (1936).

497. *See id.* at 330.

498. *See id.* at 328.

499. *See id.* at 330.

500. *Id.*; *see also* Block v. California, 244 Cal. App. 2d 266, 53 Cal. Rptr. 51 (1966) (holding enforceable an agreement issued by a physicians' service obligating injured members to reimburse the service upon collection of any damages, and to provide the service with a lien to the extent of the benefits provided).

501. *See id.*

502. 24 Bankr. 913 (W.D. Va. 1982).

503. *See id.* at 920.

504. *See id.* at 921.

505. *Id.* The court analogized proceeds assignments with an attorney's contingent fee contract. *See id.* Courts have enforced these contracts, which do not transfer any part of the cause of action, and operate solely on proceeds recovered from third parties. *Id.*

506. *See, e.g.,* Harvey v. Cleman, 65 Wash. 2d 853, 858, 400 P.2d 87, 90 (1965).

*Southern Farm Bureau Casualty Insurance Co. v. Wright Oil Co.*,<sup>507</sup> refused to make the distinction because the cause of action's only value was its possible conversion to a collectible money judgment.<sup>508</sup>

In *Grossman v. Schlosser*,<sup>509</sup> the New York Supreme Court reluctantly adhered to state precedent holding valid the assignment of a personal injury action's proceeds.<sup>510</sup> The court nevertheless noted that the distinction was based on form rather than substance, was devoid of all reality, and allowed exactly what the New York statute and common law intended to forbid.<sup>511</sup>

*b. Discharge in Bankruptcy.*—The minority rule holds that equitable assignments<sup>512</sup> do not survive subsequent discharge in bankruptcy because they do not confer any property right.<sup>513</sup> Because an equitable lien cannot attach until the property comes into being, the lien must fail if the debt is previously discharged.<sup>514</sup> Only "actually existing" liens upon a bankrupt person's property survive a discharge in bankruptcy.<sup>515</sup> The Bankruptcy Act's purpose supports this view because it allows a debtor to be free from past obligations, and this enables the debtor to start afresh, unburdened by pre-existing debt.<sup>516</sup>

The majority of courts follow the more modern rule that an equitable assignment is a valid lien which, unless disallowed or avoided, survives the underlying debt's discharge in bankruptcy.<sup>517</sup>

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507. 248 Ark. 803, 454 S.W.2d 69 (1970).

508. *See id.* at 809, 454 S.W.2d at 72.

509. 19 A.D.2d 893, 244 N.Y.S.2d 749 (1963).

510. *See id.* at 894, 244 N.Y.S.2d at 751.

511. *See id.*

512. An assignment for value of a future right operates as an equitable assignment. *See J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS* § 18-9 (3d ed. 1987). An equitable assignment may be defined as "any order, writing, or act by the assignor which makes an absolute appropriation of a chose in action or fund to the use of the assignee with the intent of transferring a present interest, but not amounting to a legal assignment. 6 AM. JUR. 2D *Assignments* § 1 (1990). In contrast, a legal assignment is an owner's manifestation to an assignee of her intent to make a present transfer of a right. *See J. CALAMARI & J. PERILLO, supra*, § 18-3.

513. *See, e.g., Gannon v. Graham*, 211 Iowa 516, 527, 231 N.W. 675, 679 (1930).

514. *See Brown v. Cunningham*, 303 Ill. App. 307, 313, 25 N.E.2d 113, 115-16 (1940). *See also Local Loan Co. v. Hunt*, 292 U.S. 234 (1934) (assignment of wages does not survive bankruptcy).

515. *See Gannon*, 211 Iowa at 526, 231 N.W. at 679.

516. *See Brown*, 303 Ill. App. at 312-13, 25 N.E.2d at 115.

517. *See, e.g., Estate of Lellock v. Prudential Ins. Co. of America*, 811 F.2d 186, 189 (3d Cir. 1987) (assignment of life insurance proceeds survives bankruptcy even though policy has not matured and is contingent).

In *Bridge v. Kedon*,<sup>518</sup> the California Supreme Court held that the continued existence of the debt as a personal obligation to pay money is unnecessary to enforcement of an equitable charge or lien upon specific property.<sup>519</sup> In *Estate of Lellock v. Prudential Insurance Co. of America*,<sup>520</sup> the United States Court of Appeals for the Third Circuit asserted that the Bankruptcy Code and its legislative history clearly support the modern rule.<sup>521</sup> The court specifically referred to Bankruptcy Code sections 506(d) and 522, pointing out that the legislative history of the original section 506(d) states that the subsection allows liens to pass unaffected through the bankruptcy proceeding.<sup>522</sup> In addition, section 522's legislative history states that discharge in bankruptcy will not prevent enforcement of valid liens.<sup>523</sup> The federal district court in *United Presidential Life Insurance Co. v. Barker*<sup>524</sup> stated that by interpreting the code provisions in this way, the goals of the bankruptcy process are met: to relieve debtors from their obligations and to protect creditors' secured property rights.<sup>525</sup> The court held that even though the underlying debt securing proceeds was discharged, the lien created prior to the bankruptcy discharge survived.<sup>526</sup>

c. *Reasoning of the Court.*—Before it addressed whether a personal injury cause of action was assignable, the court made the preliminary determination that the assignment and authorization, signed by Garcia and Hernandez, constituted a valid assignment.<sup>527</sup> The court then focused on the common law rule that causes of action for personal injuries could not be assigned.<sup>528</sup> It acknowledged that although some courts have upheld the common law rule, many have distinguished between assignment of the claim itself and as-

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518. 163 Cal. 493, 126 P. 149 (1912).

519. See *id.* at 501, 126 P. at 153.

520. 811 F.2d 186 (3d Cir. 1987).

521. See *id.* at 188-89.

522. 11 U.S.C. §§ 506(d), 522 (1988); see 811 F.2d at 188.

523. See 811 F.2d at 188.

524. 31 Bankr. 145 (N.D. Tex. 1983).

525. See *id.* at 147.

526. See *id.* at 148. See also *In re Bouchelle*, 98 Bankr. 81 (M.D. Fla. 1989) (holding enforceable a valid lien on property created prior to discharge in bankruptcy).

527. See *Hernandez*, 319 Md. at 232-33, 572 A.2d at 147. The court stated that "[a] fair and reasonable reading of [the] language can leave little doubt that the document signed by Garcia and Hernandez was intended to constitute an assignment, the subject of which was 'the proceeds' from any monetary recovery obtained in Garcia's tort case. The language cannot reasonably be read otherwise." *Id.* at 233, 572 A.2d at 147.

528. See *id.* at 233-35, 572 A.2d at 147-48.

signment of the proceeds that might be recovered from the claim.<sup>529</sup> The court did not specifically state whether it followed the reasoning of those courts making the distinction. Rather, it seemed to base its reasoning on two considerations. First, a tort claim for damages is a chose in action,<sup>530</sup> and Maryland follows the modern rule recognizing that a chose in action is assignable in the absence of a statutory prohibition, if it is a right that would survive the assignor and could be enforced by his personal representative.<sup>531</sup> The court read the Maryland statute regarding survival of actions to allow such assignments.<sup>532</sup> Second, such assignments are not contrary to public policy.<sup>533</sup> The court rejected the argument that assignments of expected tort proceeds would result in champerty or maintenance.<sup>534</sup> To the contrary, policy reasons support enforcement of these assignments: such assignments may prevent health care providers from seeking immediate action against patients who, at the time of their accidents, may lack adequate financial resources to pay for their care.<sup>535</sup>

Having determined that assignment of personal injury benefits was enforceable, the court found that the hospital had been assigned all of Garcia's interest in any proceeds recovered from her personal injury claim,<sup>536</sup> and that Hernandez had not fulfilled his obligation under the assignment.<sup>537</sup>

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529. *See id.* at 233-34, 572 A.2d at 147.

530. *See* *Unkle v. Unkle*, 305 Md. 587, 594, 505 A.2d 849, 853 (1986) (an unliquidated tort claim for damages falls within the definition of a chose in action).

531. *See Hernandez*, 319 Md. at 234, 572 A.2d at 148 (quoting *Summers v. Freishtat*, 274 Md. 404, 409, 335 A.2d 89, 92 (1975)).

532. *See id.* at 234, 572 A.2d at 145. The statute provides that causes of action other than slander survive either party's death. *See* MD. CTS. & JUD. PROC. CODE ANN. § 6-401 (1989).

533. *Hernandez*, 319 Md. at 235, 572 A.2d at 148.

534. *See id.*; *supra* notes 491 and 492.

535. *See Hernandez*, 319 Md. at 235, 572 A.2d at 148.

536. *See id.*; *see also* *James v. Goldberg*, 256 Md. 520, 527, 261 A.2d 753, 757 (1970) ("An unqualified assignment generally operates to transfer to the assignee all of the right, title and interest of the assignor in the subject of the assignment."). In *Hernandez*, the assigned interest extended only to the amount of the hospital's bill for medical services. *See* 319 Md. at 236, 572 A.2d at 148.

537. *See Hernandez*, 319 Md. at 236, 572 A.2d at 148-49. The court stated that the document specifically directed Hernandez to use the proceeds to pay the hospital. *See id.*; *see also* *Goldwater v. Fisch*, 261 A.D. 226, 25 N.Y.S.2d 84, *reh'g and app. denied*, 261 A.D. 1056, 27 N.Y.S.2d 463 (1941).

When the proceeds of the settlement were paid over to defendant, as attorney for [the patient], the equitable title of the city of New York for the amount of its claim ripened into a legal title and defendant, having full knowledge of the city's interest, was obligated to pay to the plaintiff the sum to which the city was entitled.

In addressing whether Garcia's obligation to the hospital survived her discharge in bankruptcy, the court followed the modern rule that a chose in action's assignee acquires an equitable lien which, unless disallowed or avoided, survives the underlying debt's discharge.<sup>538</sup> The court therefore held that the hospital could continue to seek enforcement of the assignment.<sup>539</sup>

In rendering its decision, the court rejected Hernandez's argument that the doctrines of waiver and estoppel barred the hospital's claim.<sup>540</sup> The hospital had no obligation to become involved in the bankruptcy proceeding, because no one attempted to disallow or avoid its equitable lien, and it was entitled to rely on the assignment.<sup>541</sup>

3. *Analysis.*—It is unclear whether the court relied primarily on the Maryland statute regarding survival of actions, or on public policy grounds in determining that the proceeds assignment was valid. If the basis of its decision was statutory, the court apparently assumed that because the cause of action would survive, it was necessarily assignable. Nowhere in the statute, however, is assignability specifically mentioned.<sup>542</sup> In *Southern Farm Bureau*, the Arkansas court addressed the enforcement of assignments based on a statute that is silent as to assignability, yet provides that the cause of action survives.<sup>543</sup> That court explained that the link between assignability and survivability began as an association of ideas, but that there are actually distinct underlying policies.<sup>544</sup> It also explained that the courts did not merge the two concepts by design, but that the merger took place without their realizing it was occurring.<sup>545</sup> The court pointed out that contributing to the merger was the absence of good policy reasons to restrict assignments when only property damage was involved.<sup>546</sup> The court found, however, that when the public policies against champerty and maintenance were considered in respect to personal injury causes of action, without exception the courts held that survivability does not carry with it assignability.<sup>547</sup>

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*Id.* at 227, 261 N.Y.S.2d at 84.

538. *See Hernandez*, 319 Md. at 237, 572 A.2d at 149.

539. *See id.*

540. *See id.*

541. *See id.* at 237-38, 572 A.2d at 149.

542. *See* MD. CTS. & JUD. PROC. CODE ANN. § 6-401 (1989).

543. *See* 248 Ark. 803, 805-06, 454 S.W.2d 69, 70-71 (1970).

544. *See id.* at 805, 454 S.W.2d at 70 (1970).

545. *See id.*

546. *See id.*

547. *See id.* at 807, 454 S.W.2d at 71. *See also* *Sherman v. Harris*, 36 S.D. 50, 153 N.W.



Additionally, if the statute was the sole basis for the court's decision, it appears that a tort cause of action itself is assignable.<sup>548</sup> If this is accurate, then the public policy reasons against such assignments, in particular, champerty and maintenance, have not been adequately addressed: the court merely dismissed champerty and maintenance as unlikely.<sup>549</sup> It may be that the court implicitly distinguished assignment of a tort claim and assignment of its potential proceeds. If so, its conclusion then would be supported by the policy reasoning expressed by the courts that made this distinction.<sup>550</sup>

Alternatively, the court may have based its decision primarily on public policy grounds. It is unclear from the court's reasoning whether these grounds support assignment of proceeds generally, or only assignments to hospitals. The court focused almost exclusively on assignments to hospitals, and found good reason to enforce these assignments.<sup>551</sup> Because monies recovered from tort actions are not subject to execution by judgment creditors,<sup>552</sup> hospitals might be forced to seek prompt payment from patients, and this could create additional financial hardships on them.<sup>553</sup> By allowing assignment of the expected personal injury proceeds, the hospital would receive some security that it would recover its fees and, consequently would be compelled to seek immediate action.<sup>554</sup>

4. *Conclusion.*—The *Hernandez* decision rejects the common law rule and its underlying policies against assignment of personal injury claims. Although the court did not fully articulate its reasoning, the decision is supported by public policy considerations, as well as the concurrence of a significant number of other courts. In concluding that such assignments are valid, the court has permitted a pay-

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925 (1915), *aff'd on reh'g*, 40 S.D. 341, 167 N.W. 325, (1918) (overruled in *Simons v. Kidd*, 73 S.D. 280, 41 N.W.2d 840 (1950)). The *Sherman* court stated that although assignability and survivability of a chose in action usually are convertible terms, the one is not the test of the other. The test of assignability is whether the particular assignment is contrary to law or public policy. *See id.* at 56, 153 N.W. at 926.

548. *See supra* note 532.

549. *See Hernandez*, 319 Md. at 235, 572 A.2d at 148.

550. *See supra* notes 494-505 and accompanying text.

551. *See Hernandez*, 319 Md. at 235, 572 A.2d at 148.

552. *See* MD. CTS. & JUD. PROC. CODE ANN. § 11-504(b)(2) (1989) (money payable in the event of the sickness, accident, injury, or death of any person, including compensation for loss of future earnings, is exempt from execution on a judgment).

553. *Hernandez*, 319 Md. at 235, 572 A.2d at 148.

554. *Id.*; *see also In re Musser*, 24 Bankr. 913 (W.D. Va. 1982). Addressing the argument that assignments will result in patients receiving less than full compensation for their damages, the court declared that this is no reason for allowing the victim to avoid paying his debts in the manner agreed upon by him and his creditors. *See id.* at 922.

ment mechanism that may benefit individuals with pending tort claims who are unable to pay hospital or medical expenses.

The court did not define the scope of its decision. It remains to be seen whether the decision will apply to the assignment of tort causes of action in addition to their proceeds, or whether it will be applied to assignments to parties other than hospitals.

JEFFREY C. MAJIKAS

DANIEL NUZZI

MICHELE J. McDONALD

JEANNE-MARIE BATES

CLAIRE E. ROONEY

JANET K. MANSFIELD

AMY L. KERXTON

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